

Principles for Policymaking About Collaborative Law and Other ADR Processes

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I. INTRODUCTION

A. *Policymaking Principles*

"Let's enact a new rule." That's a tempting approach to solve many kinds of policy problems. It is especially tempting for legislators, judges, lawyers, and legal scholars to propose new rules. Rules are our tools. Rules have the potential to encourage or discourage behavior in desired ways, allocate benefits and sanctions, protect individual rights and freedoms, establish regimes of fairness and predictability, express social values, and educate people about all this. Thus, legal rules can be excellent tools for achieving a variety of important goals.

While appreciating the valuable benefits of using rules as policy instruments in many situations, this Article argues that we should normally resist the temptation to make policies governing "alternative dispute resolution"¹ (ADR) processes merely or primarily by adopting new rules.²

¹ The term "alternative dispute resolution" is generally used to refer to a set of dispute resolution processes, including mediation and arbitration, as well as a wide range

Strategies that rely exclusively or primarily on regulation³ can create significant problems. In the name of promoting uniformity, regulation can restrict or discourage legitimate choices by disputants and dispute resolution

of others such as early neutral evaluation, summary jury trials, and ombuds work. The term is conceptually problematic but it is embedded in the vernacular and hard to avoid. It raises empirical issues about which processes are most common and philosophical issues about which processes do or should have greater value than others. These discussions often seem unproductive and it is generally preferable to use the term “dispute resolution,” referring to all dispute resolution processes, including litigation. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 140 n.5 (2000) [hereinafter Lande, *Getting the Faith*]; John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 324–25 [hereinafter Lande, *Sophisticated Theory*]. Because this Article makes distinctions based on use of court adjudication processes, it uses “ADR” in its conventional meaning of processes other than traditional litigation. From this perspective, one can think of ADR as a set of innovations intended to provide advantages over the contemporary legal system. Past ADR experiments that were once radical (e.g., workers’ compensation, small claims courts, juvenile courts, arbitration, mediation, and even medieval courts of equity) have become incorporated into the legal system and are now generally taken for granted as normal parts of that system. See generally Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005) (arguing that ADR provides relief from hardships of formal litigation similar to old courts of equity).

² In this Article, legal rules refer to generalized prescriptions (and related provisions) enforceable through court or other governmental processes. In the ADR context, this obviously includes such things as laws requiring use of ADR procedures and rules establishing evidentiary privileges and ethical requirements. Rules or standards adopted by private professional associations may be used in court as evidence of the standard of care in malpractice lawsuits. See Kathleen J. McKee, Annotation, *Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action*, 50 A.L.R. 5TH 301, 309 (1997) (“Although it is generally recognized that the intent of professional ethical codes is to establish a disciplinary remedy rather than to create civil liability, many courts have determined that pertinent ethical standards are admissible as evidence relevant to the standard of care in legal malpractice actions . . .”); A.B.A., AM. ARB. ASS’N. & ASS’N. FOR CONFLICT RESOL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, NOTE ON CONSTRUCTION (Sept. 2005), http://www.abanet.org/dispute/documents/model_standards_conduct_april2006.pdf [hereinafter A.B.A. ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS] (“[T]he fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.”). The discussion of rules in this Article includes quasi-regulatory policies—such as standards of private associations—that can be used to establish a legal standard of care. For discussion of the consequences of enforceability of rules in crafting policy through regulation, see *infra* Part II.C.2.

³ In this Article, “regulation” means use of rules as policy instruments.

professionals.⁴ This would undermine a fundamental value of the ADR field in promoting increased choice between dispute resolution alternatives.⁵ Of course, rules vary in the degree that they impose requirements and the degree of uniformity or choice involved. Some rules impose complex and demanding requirements and provide for substantial penalties for noncompliance. Other rules do not impose any requirement of compliance but rather offer opportunities for certain benefits for those who choose to take advantage of the rule. Some rules operate as default conditions and permit people to choose other options. Even the less-demanding rules typically establish specified conditions to obtain the legally sanctioned benefits.⁶ In addition to affecting behavior by creating actual or potential consequences, rules can also affect behavior by changing people's cognitive patterns. Professors Paul DiMaggio and Walter Powell describe "coercive isomorphism" as a form of institutionalization based on government rules or practices.⁷ Institutional theories of organizations analyze how conceptions become taken-for-granted notions with a "rule-like status in social thought and action."⁸ DiMaggio and Powell write that "[i]nstitutionalized arrangements are reproduced because individuals often cannot even conceive of appropriate alternatives (or because they regard as unrealistic alternatives they can imagine)."⁹ When dealing with institutionalized ideas, people operate based more on taken-for-granted understandings of the world than

⁴ The legal system and the ADR field have increasingly overlapped in recent years so that they are inextricably intertwined in many places. In my view, litigation is an important dispute resolution process and lawyers and judges are, by definition, dispute resolution professionals even if they do not identify as part of the ADR field or support use of ADR processes. See generally BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004) (arguing that ADR should not be limited to functioning of professionals as neutrals). The ADR field is not limited to the legal system, however. Many important ADR processes take place outside the legal system and are conducted by professionals in other fields and by some people who do not provide ADR services for a living.

⁵ For further discussion, see *infra* Part II.B.

⁶ See *infra* notes 127–34 and accompanying text.

⁷ See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150–51 (1983).

⁸ See Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 7–9 (Walter W. Powell & Paul J. DiMaggio eds., 1991). For discussion of the related phenomenon of a "constitutive" function of law, see *infra* notes 118–19.

⁹ DiMaggio & Powell, *supra* note 8, at 10–11.

self-conscious analyses.¹⁰ Thus, rather than promoting “reflective practice,”¹¹ regulation can promote *unreflective* practice, when practitioners increasingly operate “on automatic.” This real problem was recently described as the “capitulat[ion] to the routine” in ADR.¹²

In addition, invoking government power to establish ADR policy can increase the risk of developing orthodox dispute resolution ideologies by officially favoring certain procedures and disfavoring others. This risks inhibiting the development of innovations and the availability of a variety of options. This risk is heightened when rules are developed by experts based more on their own philosophies than a systematic assessment of disputants’ needs and interests.¹³

Of course, some regulation of ADR is quite appropriate, including some rules that limit certain choices and authorize serious legal consequences. This Article argues that it is appropriate in some circumstances to regulate use of ADR communications in court, regulate the relationship between ADR processes and the courts, protect dispute resolution consumers, and establish default rules.¹⁴ For example, rules are appropriate to prohibit admissibility in court of certain mediation communications, require parties to attend mediation (and punish noncompliance), require that dispute resolution practitioners obtain informed consent from clients in many situations, and establish default procedures based on experience with problems due to lack of established procedures.¹⁵

Just as society encourages people to use trials only after exploring other processes for resolving disputes, ADR policymakers¹⁶ should adopt new

¹⁰ For further discussion of institutional theory, see Lande, *Getting the Faith*, *supra* note 1, at 153–55.

¹¹ See *infra* Part II.C.5.

¹² See Christopher Honeyman, *Prologue: Observations of Capitulation to the Routine*, 108 PENN ST. L. REV. 9 (2003); see generally Symposium, *Interdisciplinary Collaboration and the Beauty of Surprise: A Symposium Introduction*, 108 PENN ST. L. REV. 1 (2003) (discussing problems related to routinization of ADR).

¹³ See *infra* Part II.C.

¹⁴ See *infra* Part II.C.4.

¹⁵ *Id.*

¹⁶ For the purpose of this Article, policymakers include, but are not limited, to rulemakers. Thus this includes legislatures, courts, government agencies, and authoritative professional organizations (such as the American Bar Association Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws) whose policies may be implemented through government processes. See *Dispute Resolution Policies*, A.B.A. SEC. DISP. RESOL., <http://www.abanet.org/dispute/webpolicy.html> (last visited Feb. 5, 2007) (listing ADR

rules only after analyzing the applicable dispute system and considering the benefits and limits of nonregulatory means of achieving ADR policy goals.¹⁷ Nonregulatory approaches include training for disputants and professionals, dispute referral mechanisms, technical assistance for ADR organizations, and grievance mechanisms for parties in ADR processes, among others.¹⁸ The most effective strategies are likely to involve a coordinated combination of such options.¹⁹ ADR policymakers should generally begin by considering nonregulatory options and adopt regulatory options only to the extent needed to accomplish desired goals.²⁰

In addition to describing types of substantive policy options that policymakers should adopt, this Article outlines a general approach to policymaking, including the following principles. Policymakers should use a dispute system design framework in analyzing policy options, which includes assessment of disputants' needs and interests.²¹ Practitioners and policymakers should generally provide a range of suitable choices of dispute resolution processes for individual disputants and system stakeholders.²² Dispute resolution professionals should maintain appropriate relationships between innovative ADR processes and the contemporary dispute resolution system.²³ These recommendations are intended to promote the related values of process pluralism²⁴ and good decisionmaking about dispute resolution by parties and professionals.

policy recommendations). Recommendations in this Article directed to policymakers also apply to proponents of ADR policies.

¹⁷ See *infra* Part II.C.

¹⁸ For a more detailed list, see *infra* note 91 and accompanying text.

¹⁹ See *infra* Part II.C.

²⁰ See *infra* Part II.C.

²¹ See *infra* Part II.A.

²² See *infra* Part II.B.

²³ See *infra* Part II.D.

²⁴ See Lande, *Getting the Faith*, *supra* note 1, at 147–51, 227–29 (describing “process pluralist” ideology consisting of an “interrelated set of beliefs that embrace the availability and acceptability of a wide range of goals, norms, procedures, results, professional roles, skills, and styles in handling disputes involving legal issues” so that “many different features of disputing processes can be manipulated and customized for each dispute”). For further discussion of process pluralism, see *infra* notes 56, 94, and accompanying text.

B. Collaborative Law

To illustrate the preceding principles, this Article analyzes Professor Christopher Fairman's proposal²⁵ for a new ethical rule²⁶ for "Collaborative Law"²⁷ (CL) and contrasts it with a proposal by Professor Scott Peppet.²⁸

²⁵ See Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73 (2005). Others share Fairman's position advocating new rules for CL. For example, Zachery Annable argues that "it would probably be best to push for the implementation of new ethical standards to accommodate ADR processes like collaborative lawyering." Zachery Z. Annable, Comment, *Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and its Conformity with the Model Rules of Professional Conduct*, 29 J. LEGAL PROF. 157, 168 (2004–2005). Elizabeth Strickland advocates adoption of CL statutes arguing that this "would further legitimize the process and address some of these ethical problems by providing procedures for limiting the scope of representation, guaranteeing confidentiality, and obtaining informed consent, to name a few." Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 1001 (2006). Professor Larry Spain "questions whether current ethical rules can accommodate this new collaborative law model of practice." Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 156 (2004). Spain does not express a definite conclusion but suggests that "[i]t may be that the existing rules of professional conduct for lawyers must be redefined . . ." *Id.* at 172–73. Fairman makes an important contribution to the literature by articulating a detailed rationale for and proposed text of a new rule.

²⁶ In this Article, "ethical rules" or "general ethical rules" refer to rules adopted by states or state bar associations governing the conduct of lawyers generally, such as rules following the Model Rules of Professional Conduct. Ethical rules adopted by other entities, such as specialized professional associations, for example, *supra* note 2, are not included in generic references to "ethical rules."

²⁷ "Collaborative Law" is actually a multi-disciplinary process that often involves professionals working in teams that include financial, mental health, and child development experts. See generally Susan Gamache, *Collaborative Practice: A New Opportunity to Address Children's Best Interest in Divorce*, 65 LA. L. REV. 1455 (2005) (describing the functioning of a team of Collaborative professionals). Thus, it is often more appropriate to refer to "Collaborative Practice" rather than "Collaborative Law." Nonetheless, the term "Collaborative Law" is generally used in this Article because it focuses primarily on the regulation of lawyers in the Collaborative Process.

This Article also adopts the convention of capitalizing these terms to distinguish the formal process from processes that are generally collaborative but that do not include the formal elements of Collaborative Practice as described, *infra*, at notes 29–31 and accompanying text.

²⁸ See Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA

This Article argues that Professor Peppet's proposal is generally preferable because it is more consistent with the principles presented in this Article, though both proposals would benefit by following those principles to a greater extent.

In CL, the lawyers and clients sign a "participation agreement" committing to use an interest-based approach to negotiation²⁹ from the outset of the case and provide full disclosure of all relevant information.³⁰ A key element of the participation agreement is the "disqualification agreement," which stipulates that both CL lawyers would be disqualified from representing the clients if the case is litigated.³¹ The disqualification

L. REV. 475 (2005). Peppet's proposal would apply to CL as well as many other lawyering arrangements. *See infra* Part III.B.

²⁹ An interest-based approach—sometimes called a "problem-solving" approach— involves identification and selection of options maximizing the interests of all the parties. People begin by identifying interests and developing options for mutual gain and then select the best option. *See* ROGER FISHER ET AL., *GETTING TO YES* 40–80 (2d ed. 1991); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 794–829 (1984). This contrasts with a traditional, positional—or adversarial—approach, in which each side sets extreme aspiration levels and makes a series of strategic offers and counter-offers intended to result in a resolution as close as possible to that side's initial aspiration. Typically, each side makes small concessions to maximize its adversarial advantage. *See* FISHER ET AL., *supra*, at 4–7. An interest-based approach relies more on reason than threat and has the potential to "create value" by identifying and satisfying the interests of all the parties. *See id.* at 81–84. For additional cites, see John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1319 n.6 (2003).

³⁰ *See* Lande, *supra* note 29, at 1318–28.

³¹ *See id.* at 1322 n.20. Some CL practitioners prefer the term "withdrawal agreement" or "collaborative commitment" instead of "disqualification agreement," believing that those terms more accurately reflect the arrangement, avoid confusion with disqualification under conflict of interest rules, or project a more positive image. Although the two CL statutes that have been enacted to date use the term "withdraw" instead of "disqualification," the court would effectively disqualify the lawyers if CL lawyers attempted to represent CL clients in court. *See* N.C. GEN. STAT. ANN. § 50-76(c) (West 2006) ("If a civil action is filed or set for trial . . . , the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party."); TEX. FAM. CODE ANN. § 6.603(b) (Vernon, 2006) ("The parties' counsel may not serve as litigation counsel . . ."); *id.* at § 6.603(c)(4) ("A collaborative law agreement must include provisions for . . . withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute."). This Article uses the term "disqualification agreement" to reflect this reality as well as common usage in the CL community, ethics opinions, and published literature. *See, e.g.,*

agreement is intended to motivate lawyers and clients to focus exclusively on negotiation, as the termination of a CL negotiation ends the CL lawyers' engagement and requires both clients to hire new lawyers (if they want legal representation).³² Although CL doctrine could apply in many types of cases, virtually all of the cases have been in family law matters.³³ The Collaborative Movement has grown dramatically since its founding in 1990 and has developed an impressive infrastructure of local practice groups,³⁴ general and specialized trainings,³⁵ law school course offerings,³⁶ ethical codes,³⁷

NANCY J. CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* 276–77 (2004); SHEILA M. GUTTERMAN, *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 52–54 (2004); RICHARD W. SHIELDS ET AL., *COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES* 246 (2003); PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 6, 146 (2001).

³² See Lande, *supra* note 29, at 1322–24. Fairman and CL practitioners argue that the disqualification agreement is the central source of power of their process. See Fairman, *supra* note 25, at 80 (arguing that “the disqualification provision provides the real force behind collaborative law”). The development of local practice culture through the operation of local CL groups may be even more significant in producing good effects than the disqualification agreement. Practitioner David Hoffman, who has handled cases with and without a disqualification agreement, argues that the “chemistry, intentions, and skill of the participants” is more critical to the success of a negotiation process than whether the parties use the disqualification agreement or not. See David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW PRACTICE* (Nancy ver Steegh & Kelly Browe Olson eds., forthcoming 2007). See also *infra* note 62 and accompanying text (describing Cooperative Law, which does not use disqualification agreements).

³³ For an excellent analysis explaining why parties have not used CL in business cases, including resistance to the disqualification agreement, see David A. Hoffman, *Collaborative Law in the World of Business*, *COLLABORATIVE REV.*, Winter 2004, at 1. For suggestions to adapt CL for civil cases, see John Lande, *Negotiation: Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 *ALTERNATIVES TO HIGH COST LITIG.* 149 (2003). For further discussion, see *infra* Part III.C.1.d.

³⁴ See Int'l Acad. Collaborative Prof., *Locate a Collaborative Practice Group*, <http://www.collaborativepractice.com/t2.asp?T=LocateGroup> (last visited Feb. 5, 2007).

³⁵ See Int'l Acad. Collaborative Prof., *Collaborative Practice Events and Trainings*, <http://www.collaborativepractice.com/t2.asp?T=Calendar> (last visited Feb. 5, 2007). CL practice groups typically provide regular continuing education and require members to attend such sessions. See Lande, *supra* note 29, at 1326 n.29.

³⁶ See Lande, *supra* note 29, at 1327–28 (identifying earliest law school courses on CL).

³⁷ See, e.g., Int'l Acad. Collaborative Prof., *Standards, Ethics and Principles*, <http://www.collaborativepractice.com/t2.asp?T=Ethics> (last visited Feb. 5, 2007).

professional associations,³⁸ websites,³⁹ articles,⁴⁰ and books.⁴¹ Collaborative practice groups have developed public relations strategies⁴² and have received much favorable publicity.⁴³

Many CL practitioners have devoted great effort to develop this significant new model of practice, which is designed to make the interest-based approach the norm in negotiation. Getting people to use an interest-based approach instead of the traditional, positional approach has been a difficult problem. ADR experts have provided helpful suggestions for “changing the game,” though these are usually limited to case-by-case efforts within a culture of adversarial negotiation.⁴⁴ CL is an ingenious mechanism to generally reverse the traditional presumption that negotiators will use adversarial negotiation. In addition, it develops a new legal culture by institutionalizing local practice groups and has great potential to develop more reflective practice.⁴⁵ The ADR field has much to learn from CL’s achievements and challenges.

Professor Fairman proposes that the American Bar Association (ABA) adopt a new ethical rule specifically for CL.⁴⁶ This Article argues that a new rule is not necessary and that adopting such a rule prematurely may actually inhibit useful innovations in practice. It argues that Professor Fairman’s proposal assumes that adopting a new rule is the best way to regulate behavior in ADR processes, even though ADR is generally intended to promote greater freedom in decisionmaking rather than greater reliance on

³⁸ See Int’l Acad. Collaborative Prof., Collaborative Practice Events and Trainings, <http://www.collaborativepractice.com/t2.asp?T=Calendar> (last visited Feb. 5, 2007).

³⁹ See Int’l Acad. Collaborative Prof., Links, <http://www.collaborativepractice.com/t2.asp?T=LinksPro> (last visited Feb. 5, 2007).

⁴⁰ See Lande, *supra* note 29, at 1326 n.30; Int’l Acad. Collaborative Prof., Resources: Articles, <http://www.collaborativepractice.com/t2.asp?T=ArticlesPro> (last visited Feb. 5, 2007).

⁴¹ See CAMERON, *supra* note 31; GUTTERMAN, *supra* note 31; SHIELDS ET AL., *supra* note 31; TESLER, *supra* note 31.

⁴² See Int’l Acad. Collaborative Prof., Public Education Committee, <http://www.collaborativepractice.com/t2.asp?T=PublicEd> (last visited Feb. 5, 2007).

⁴³ A search for the term “collaborative law” in the “allnews” database in Westlaw yielded 162 documents (last visited Feb. 5, 2007).

⁴⁴ See, e.g., FISHER ET AL., *supra* note 29, at 107–28; ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATION TO CREATE VALUE IN DEALS AND DISPUTES 207–20 (2000); WILLIAM L. URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 67 (1993).

⁴⁵ See *infra* Part II.C.5 for discussion of reflective practice.

⁴⁶ See Fairman, *supra* note 25, at 116–22.

legal rules.⁴⁷

Some rules are necessary and appropriate in policymaking about CL, and thus the issue is not whether to have rules. Indeed, as Professor Fairman demonstrates, many ethical rules already regulate lawyers' CL services, and bar association ethics committees have applied those rules to CL.⁴⁸ Thus the issue is whether it is necessary or wise to adopt a new and uniform rule now. This Article argues that other, nonregulatory mechanisms are likely to be more appropriate in managing people's behavior in CL. Establishing new rules may have the unintended effect of inhibiting people from developing and using appropriate techniques because certain issues will have been settled by official rules.

Though much of the second half of this Article consists of a detailed critique of Professor Fairman's proposal, it is useful to begin by highlighting some areas of agreement. We both share a strong commitment to the goals of the CL movement. We want to encourage lawyers to help clients negotiate constructively and to make informed agreements that address clients' most important concerns. We believe that it is important to provide appropriate processes to help clients work through difficult conflicts to achieve these goals. We agree that it is important that CL practice is well-grounded in ethical rules within the legal profession, which provides an important foundation for legal practice. However, we agree to disagree, in part, about the best way to practically accomplish these goals—and we hope that this discussion will help the CL movement and ADR field develop wise and effective policies to achieve them.

This Article proceeds as follows: Part II outlines a general approach to policymaking about ADR, articulating four general principles for designing dispute systems and optimal procedures and processes for disputants involved in these systems. Part III illustrates these principles by applying them to Professor Fairman's and Professor Peppet's proposals. Part IV offers a brief conclusion.

II. RECOMMENDED PRINCIPLES FOR POLICYMAKING ABOUT ADR

A. Use of Dispute System Design Analysis with an Ecological Perspective of Dispute Resolution

One can think of policymaking as planning to manage a class of

⁴⁷ See *infra* Parts II.B, III.C.1, 3.

⁴⁸ See Fairman, *supra* note 25, at 84–116. For discussion of the ethics committee opinions about CL, see *infra* Parts III.C.1.b, c.

situations in the future. The ADR field has developed a subfield for policymaking about disputing, called "dispute system design" (DSD).⁴⁹ DSD focuses on systematically managing a series of disputes rather than handling individual disputes on an ad hoc basis. Private businesses use it to manage conflicts with employees, customers, and suppliers.⁵⁰ Courts and government agencies use similar processes as well.⁵¹ In general, DSD involves assessing the needs of disputants and other stakeholders⁵² in the system, planning a system to address those needs, providing necessary training and education for disputants and relevant dispute resolution professionals, implementing the system, evaluating it, and making periodic modifications as needed.⁵³ A full-fledged DSD effort may not be feasible in many situations because it would require more time, effort, and other resources than available or appropriate. ADR policymakers should consider using DSD procedures and principles as much as feasible given their circumstances.

Policymakers should analyze potential policies in the context of the overall dispute resolution system and not merely focus on the policies in

⁴⁹ For a brief overview of DSD, see John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 112–17 (2002). Important recent contributions to this field include Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004); Amy J. Cohen & Ellen E. Deason, *Comparative Considerations: Toward the Global Transfer of Ideas About Dispute System Design*, DISP. RESOL. MAG., Spring 2006, at 23; Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005).

⁵⁰ For example, General Electric, Shell Oil, and Halliburton companies used DSD procedures to revise their dispute systems. See KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 64–74 (1998).

⁵¹ See Lande, *supra* note 49, at 110–16.

⁵² Stakeholders are those whose interests would be affected by a decision or action. In the context of dispute resolution, stakeholders might include, but are not necessarily limited to, disputants, dispute resolution professionals, public or private organizations, and communities. Dispute resolution professionals might include lawyers, neutrals, judges, and other court personnel, among others. See generally CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 49–66 (1996) (describing stakeholders generally).

⁵³ See generally *id.*; DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003); SLAIKEU & HASSON, *supra* note 50; WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

isolation. In developing ADR policies, the goal should be to improve the system as a whole rather than promote a particular ADR process.⁵⁴ Marc Galanter and Mia Cahill illustrate a systemic perspective using the concept of “ecology” of disputing,⁵⁵ noting that “all components of the intricate ecology of disputing are linked in complex and sometimes paradoxical ways to what courts do.”⁵⁶

Unfortunately, many dispute resolution professionals do not have such a systemic mindset. Some of us promote our favorite processes as if the goal is to compete in a contest for best process rather than to develop a good overall system. For example, some generally favor ADR over litigation and others have the opposite preferences. There is similar competitiveness between families and species of ADR processes, with passionate fans touting mediation over arbitration or facilitative mediation over evaluative mediation (and vice versa).⁵⁷ Some Collaborative practitioners, proclaiming that CL

⁵⁴ Costantino and Merchant advocate a systems perspective in DSD, focusing on the full range of processes within a given organization that is designing a system. See COSTANTINO & MERCHANT, *supra* note 52, at 22–24. This Article proposes expanding that notion to encompass relevant processes outside the organization as well. For example, if a business is designing a system to handle employee complaints, it should consider the range of external processes available (such as litigation and private ADR) in addition to the processes within the business.

⁵⁵ See Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in LAW AND THE SOCIAL SCIENCES 160–64 (Leon Lipson & Stanton Wheeler eds., 1986). For further discussion of this concept, see generally John Lande, *Shifting the Focus From the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191 (2005) (describing an “ecological” perspective of dispute resolution).

⁵⁶ Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1391 (1994). An ecological perspective is related to calls for “pluralistic” approaches to dispute resolution. See e.g., Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 965 (2004); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 874–78 (1997) (advocating a pluralistic approach to mediation); Lande, *Getting the Faith*, *supra* note 1, at 147–51, 227–29 (defining “process pluralism”); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553 (2006) (favoring “process pluralism”).

Sociologist Andrew Abbott provides a helpful theoretical framework, describing an interdependent “system of professions” which focuses on the jurisdictional boundaries between related professions in analyzing the system as a whole. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988).

⁵⁷ See Lande, *Sophisticated Theory*, *supra* note 1, at 325–330.

represents a “paradigm shift,”⁵⁸ assert its general superiority over mediation and traditional litigation—and some CL practitioners describe litigation as if it is a plague.⁵⁹ This is part of a general pattern within the dispute resolution field in which people promote orthodoxies that portray disputing processes as carriers of good or evil.⁶⁰ Although these views are generally quite sincere and are often framed in terms of disputants’ interests, that is beside the point. The point is that, using an ecological mindset, we should focus on promoting a healthy *system* with a variety of desirable dispute resolution species to choose from. Although some might use the ecology metaphor to suggest a vicious jungle where species ruthlessly compete for survival, we should instead choose a concept of creating and managing an environment where species generally coexist harmoniously.⁶¹ From the latter perspective, the dispute resolution field should nurture all of the species (including litigation) to function optimally. In more concrete terms, the goal should be to maintain a system that offers many different high-quality processes including mediation, arbitration, Collaborative Law, Cooperative Law,⁶² and court

⁵⁸ See Lande, *supra* note 29, at 1317 n.2 (collecting references to claims that CL represents a “paradigm shift”).

⁵⁹ See JULIE MACFARLANE, *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 5–6*, at 24 (2005), <http://canada.justice.gc.ca/en/ps/pad/reports/2005-FCY-1/2005-FCY-1.pdf> (stating that the “intensity of the revulsion expressed toward litigation is sometimes startling”). Macfarlane also describes a “sibling rivalry” that many Collaborative practitioners feel toward mediation. *See id.* at 73–75.

⁶⁰ See Lande, *supra* note 56, at 854–58 (criticizing “single-school” philosophies of mediation and advocating, instead, a pluralist approach). Macfarlane raises a similar concern about CL, arguing that “if CFL [collaborative family law] is to develop integrity as a process choice for family transitions—particularly as a process that trumpets the autonomous decisionmaking role of the client—it is critical to remove the taint of ideology” MACFARLANE, *supra* note 59, at 35–36.

⁶¹ Abbott’s description of an ongoing series of competitions between occupational groups to control professional jurisdictions is more consistent with the jungle than the stewardship metaphor. *See* ABBOTT, *supra* note 56, at 69–79. He describes contests between professionals who normally assume a single role, such as in competition between doctors and nurses or lawyers and accountants. By contrast, in the dispute resolution field, practitioners often assume multiple roles, which might include two or more of the following roles, among others: traditional lawyer, Collaborative Lawyer, Cooperative Lawyer, neutral evaluator, mediator, arbitrator, and private judge. The fact that dispute resolution practitioners need not operate solely in a single professional role creates opportunities for greater identification with the overall dispute resolution field and can lessen the competitive pressures to some extent.

⁶² Cooperative Law is a process that includes the features of CL other than the disqualification agreement. *See* John Lande & Gregg Herman, *Fitting the Forum to the*

services (including trials), among others, so that parties can choose between good alternatives that have varying advantages and disadvantages, as described in the next Part.⁶³ It is unrealistic to expect that every proposal for ADR policy will include a systemic analysis of how the proposed policy would fit into or affect the relevant dispute resolution system. Nonetheless, it is an ideal worth striving to achieve when feasible.

B. Provision of a Variety of Desirable Processes for Disputants and System Stakeholders

As a corollary to the principle that the ADR field should provide a variety of desirable options, it should engage representatives of parties and other stakeholders in decisions about dispute resolution processes as much as appropriate. This principle applies to handling individual cases as well as developing general ADR policies.

1. Provision of Procedural Options for Disputants in Individual Cases

Dispute resolution professionals serving clients should help the clients evaluate process options that might reasonably satisfy the clients' interests

Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases, 42 FAM. CT. REV. 280 (2004); MID-MO. COLLABORATIVE & COOPERATIVE L. ASS'N, CHOOSING COLLABORATIVE OR COOPERATIVE LAW (2006), http://www.mmcccla.org/choosing_ccl.pdf. For examples of Cooperative Law participation agreements, see BOSTON L. COLLABORATIVE, COOPERATIVE PROCESS AGREEMENT (2006), <http://www.bostonlawcollaborative.com/documents/2006-02-cooperative-process-agreement.pdf>; DIVORCE COOPERATION INST., COOPERATIVE DIVORCE AGREEMENT, <http://cooperativedivorce.org/members/cdagreement04.pdf> (last visited Feb. 5, 2007); MID-MO. COLLABORATIVE & COOPERATIVE L. ASS'N, PARTICIPATION AGREEMENT IN COOPERATIVE LAW PROCESS, http://www.mmcccla.org/coop_partic.pdf (last visited Feb. 5, 2007). This author has advised the Mid-Mo. Collaborative & Cooperative L. Ass'n.

Some CL practitioners dismiss Cooperative Law as being no different than traditional practice, which is obviously untrue considering that lawyers do not traditionally use written participation agreements, lawyers traditionally use positional negotiation rather than interest-based negotiation, and the parties generally are not actively involved in traditional negotiation.

⁶³ See generally Lande & Herman, *supra* note 62 (analyzing advantages and disadvantages of various dispute resolution processes).

and should not simply steer clients to the professionals' favorite process.⁶⁴ Moreover, within a given process, dispute resolution professionals should encourage party decisionmaking as much as the parties desire and is appropriate in particular circumstances.⁶⁵

Standard I.A of the recently revised Model Standards Practice for Mediators nicely articulates the principle of promoting procedural decisionmaking in individual cases. It states that:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to *process and outcome*. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.⁶⁶

Professor Leonard Riskin's recent revision of his grid provides an elaborate framework for such decisionmaking, including decisions about substantive and procedural issues as well as what he calls "meta-procedural"

⁶⁴ This recommendation reflects a general policy value and not an opinion about professional ethical duties, which involve many issues beyond the scope of this Article. Professor Marshall Breger provides a thoughtful analysis of ethical authorities throughout the U.S. about whether lawyers have an ethical duty to advise clients about ADR options. See Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000). See also Robert F. Cochran, Jr., *ADR, The ABA, and Client Control: A Proposal That the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999). Breger argues that the language of the authorities is often unclear and that some establish explicit or implicit duties and other authorities are merely "precatory." See Breger, *supra*, at 428–36, 452–57.

⁶⁵ See Lande, *supra* note 55, at 857–79 (recommending a process for identification and analysis of appropriate options to promote "high-quality consent"); Lande, *Sophisticated Theory*, *supra* note 1, at 325 n.25 (suggesting the term high-quality "decisionmaking" rather than "consent").

⁶⁶ A.B.A. ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 2 (emphasis added). As the Reporter's Notes to the Model Standards indicate, this new version of the standards makes an important addition to the prior version which "focuses exclusively on exercising self-determination with respect to outcome; it is silent with regard to such matters as mediator selection, designing procedural aspects of the mediation process to suit individual needs, and choosing whether to participate in or withdraw from the process." Joseph P. Stulberg, *Reporter's Notes, Model Standards of Conduct for Mediators* (Sept. 9, 2005), <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-092005final.pdf>.

issues (i.e., decisions about how procedural decisions will be made).⁶⁷ Riskin's new grid recognizes that mediation involves decisions about many procedural issues and that the parties may be more or less involved in those decisions. Procedural decisions include: (1) the purposes of the mediation and definition of the problems to be mediated; (2) roles of mediators, lawyers, and clients; (3) logistics of the mediation (e.g., location, time, use of pre-mediation submissions, availability of food); (4) attendance of particular individuals; and (5) procedures used during mediation (e.g., use of positional or interest-based approach, use of opening statements, caucuses, process for developing and exchanging offers, evaluative statements by mediators, drafting agreements).⁶⁸ As Riskin points out, it is not always appropriate or desirable for parties to make all the procedural and meta-procedural decisions in their cases, but it is appropriate to consider engaging them in procedural decisionmaking.⁶⁹ For some mediators (and advocates in mediation) this would represent a significant shift because they have narrow views about the legitimacy of various procedures and client participation in

⁶⁷ See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 34–51 (2003).

⁶⁸ *Id.* at 35–37 (categorization and numbering added). Somewhat similarly, Professor Michael Moffitt proposes to increase procedural decisionmaking in litigation. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888221.

⁶⁹ Riskin, *supra* note 67, at 49. Riskin writes:

I believe there is often much to be gained—in terms of self-determination and the quality of process and outcome—from establishing an explicit decisionmaking process that offers the opportunity for all, or most, participants to influence important substantive, procedural and meta-procedural issues. And I hope that this Article encourages such processes by enhancing awareness of decisionmaking options. But many mediations that lack explicit decisionmaking about procedural and meta-procedural issues work fine. A choice to make procedural and meta-procedural decisionmaking more open and inclusive carries costs in terms of time, energy and financial expenditures. It also presents risks of undermining the efficiency and focus of a mediation and the ability of a mediator to act quickly. So resolving the issue of openness in decisionmaking requires a delicate balance. I do not seek to make that balance, only to mention it.

Id. at 49. See also Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003) (arguing that people may make poor decisions when presented with too many options or irrelevant options if it causes them to become overwhelmed or confused).

procedural decisionmaking.⁷⁰ As an example of soliciting parties' participation in procedural decisionmaking, Professor Lela Love and mediator Jack Cooley propose a process for eliciting parties' consent for mediators to give evaluative input in a mediation.⁷¹

Professor Julie Macfarlane found that CL practitioners vary in the extent to which they encourage clients to consider other processes. Some practitioners make a point of providing a balanced analysis of the process options, sometimes even expressing a preference for mediation, whereas others "candidly acknowledge that they do not really think about mediation any longer as an alternative."⁷² Very few CL practitioners suggest that clients consider a Cooperative Process even though it might better serve interests in speedy resolution of some issues, reduction in risk of increased cost in the event of litigation, and maintaining a relationship with their lawyers.⁷³ Practitioners should exercise their professional judgment, which can appropriately involve general preferences for some processes over others in particular situations. Practitioners should, however, give clients advice based primarily on the clients' particular circumstances and interests and not as much based on the practitioners' values.

2. *Design of Dispute Systems to Provide Choices of Process Options*

When developing dispute resolution processes generally (i.e., not selecting procedures in particular cases as described in the preceding Part), professionals should consider a variety of processes to satisfy parties' varying interests and preferences. In an open letter to members of the International Academy of Collaborative Professionals (IACP), practitioner David Hoffman expresses this principle vividly:

⁷⁰ See *supra* note 60 and accompanying text (discussing orthodoxy about dispute resolution processes).

⁷¹ See Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45 (2005).

⁷² MACFARLANE, *supra* note 59, at 74.

⁷³ See Hoffman, *supra* note 32. Hoffman describes one case he handled in which the parties used CL but would have been better served by a Cooperative Process so that they could have retained their lawyers and gotten an expeditious decision on a critical issue. He describes two other cases where the parties were well served by using a Cooperative Process because they were not confident whether they could reach agreement or wanted to avoid the risk of hiring new lawyers if they needed to go to court. *Id.*

As professionals, . . . we have a duty to inform our clients about the full range of options, and as a professional organization, we should be helping our members carry out that responsibility. . . . Let a thousand flowers bloom and let IACP be the garden in which the best of those flowers are nurtured and grown. To say that our garden should grow only one variety—even if it is a strikingly attractive bloom—will simply force those who want to cultivate a wider variety to create other gardens.⁷⁴

Uniformity of dispute resolution practices is the opposite of providing variety. Some people believe in a value of uniformity of practices generally,⁷⁵ which limits choices by definition. Uniformity is certainly appropriate in some situations. For example, when the government imposes criminal sanctions, it is quite appropriate to use fairly uniform standards.⁷⁶ In an ADR context, the drafters of the Uniform Mediation Act made a

⁷⁴ David Hoffman, An Open Letter to the Collaborative Practice Community and IACP (International Academy of Collaborative Professionals) (Sept. 2006), http://www.bostonlawcollaborative.com/documents/Letter_to_CP_Community_and_IACP.doc (last visited Feb. 5, 2007).

⁷⁵ For many people, especially lawyers, uniformity has an intuitive symbolic value. Professor Thomas Main describes it this way: “Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism or some combination of these, the norm of procedural uniformity enjoys virtually universal approval.” Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 311–12 (2001) (footnotes omitted). Such uniformity of rules is frequently illusory, however. Professor Marc Galanter writes that our legal system is structured to “permit[] unification and universalism at the symbolic level and diversity and particularism at the operating level.” Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 148 (1974).

In the mediation context, an impulse for uniformity often arises as a desire for a single, uniform definition of mediation. For example, Professors Kimberlee Kovach and Lela Love argued for a single standard of acceptable mediation as follows. “To develop rules, standards, ethical norms and certification requirements, legislators and administrators need well-defined and uniform processes. Similarly, meaningful program evaluations require uniformity. . . . ‘Mediation’ should mean the same thing from state to state, and from one court to another within a state.” Kimberlee K. Kovach & Lela P. Love, “*Evaluative*” *Mediation is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 32 (1996). In the CL context, Strickland advocates adoption of CL statutes to promote uniformity of practices. See Strickland, *supra* note 25, at 999, 1002.

⁷⁶ See, e.g., Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246–47 (2005) (noting that Congress intended to tightly limit judicial discretion in criminal sentencing, though it still left some discretion to judges in individual cases).

compelling case for some uniform rules governing mediation, citing proliferation of more than 2500 mediation statutes, with tremendous variations of mediation rules within and between jurisdictions.⁷⁷

Uniformity imposes costs, however, and should be used in ADR policies only if the benefits outweigh the costs.⁷⁸ Potential costs of uniformity include increased risk of orthodox ideologies⁷⁹ as well as reductions of individual judgment, diversity of practices, and potential for innovation. For example, the mediation field periodically has considered proposals for uniform certification systems.⁸⁰ I believe that these proposals have foundered, in part,

⁷⁷ UNIF. MEDIATION ACT, Prefatory Note ¶ 3 (2001). *See generally* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001) (describing rationale for Uniform Mediation Act).

⁷⁸ The National Conference of Commissioners on Uniform State Laws has established a balancing test for determining whether a matter is suitable for a uniform or model act. The Conference's policy for considering possible acts includes the following requirement:

[T]he subject of the Act shall be such that uniformity of law among States will produce significant benefits to the public through improvements in the law (for example, facilitating interstate economic, social or political relations, or responding to a need common to many States as to which uniform legislation may be more effective, more efficient, and more widely and easily understood) or will avoid significant disadvantages likely to arise from diversity of state law (for example, the tendency of diverse laws to mislead, prejudice, inconvenience or otherwise adversely affect the citizens of the States in their activities or dealings in other States or with citizens of other States or in moving from State to State).

NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS, REFERENCE BOOK 119 (2005–06) (Statement of Policy Establishing Criteria for Designation and Consideration of Acts). The policy states that the Conference should avoid subjects that are:

- (i) entirely novel and with regard to which neither legislative nor administrative experience is available;
- (ii) controversial because of disparities in social, economic or political policies or philosophies among the various States; and
- (iii) of purely local or state concern and without substantial interstate implications unless conceived and drafted to fill emergent needs or to modernize antiquated concepts.

Id. at 120. For a thoughtful discussion of the advantages and disadvantages of uniformity, see Peppet, *supra* note 28, at 501–503, 511–14, 518–19.

⁷⁹ *See supra* note 60 and accompanying text.

⁸⁰ The Association for Conflict Resolution Mediator Certification Task Force recently issued a proposal for certification of mediators. *See* ASS'N FOR CONFLICT RESOL., REPORT AND RECOMMENDATIONS TO THE ACR BOARD OF DIRECTORS (2004), <http://www.acrnet.org/about/taskforces/certification.htm>.

because many mediators worried that the costs of a uniform system would outweigh the benefits.

In designing ADR processes, policymakers should normally solicit input from key stakeholder groups.⁸¹ The process of eliciting input may take various forms and depend on the resources available. In some cases, it may involve formation of a committee that includes representatives of the various stakeholder groups. It is valuable to convene a group of stakeholders, including practitioners, as well as independent analysts. Being human, all of us have blind spots and biases. Convening a representative group with diverse perspectives can help identify such biases and lead to a better policy than what like-minded experts or a single stakeholder group might devise. Collecting data from stakeholders can be especially helpful. For example, the ABA Section of Dispute Resolution's Task Force on Improving Mediation Quality conducted a series of focus groups with various stakeholder groups to learn what they find particularly helpful (and unhelpful) in mediation.⁸²

After assessing stakeholders' interests, policymakers should develop policies to satisfy those interests, engaging stakeholder representatives in the policymaking process as much as feasible.⁸³ The drafting of the Uniform Mediation Act illustrates the benefits of crafting policies to fit stakeholders' interests. The drafting process was long and challenging and the results did not satisfy everyone, but the final result was vastly improved as a result of the extensive engagement of various stakeholders.⁸⁴ The Maryland Program for Mediator Excellence provides another good example of extensive consultation in policymaking.⁸⁵

On the other hand, the CL movement illustrates a problem of failing to elicit stakeholders' input in designing processes. As a matter of experience and faith, most CL practitioners believe deeply in the importance of the

⁸¹ See COSTANTINO & MERCHANT, *supra* note 52, at 96–116.

⁸² See John Lande & Rachel Wohl, *Listening to Experienced Users: How Can We Improve the Quality and Expand the Use of Commercial Mediation*, DISP. RESOL. MAG., (forthcoming 2007) (summarizing results of focus groups with about ninety participants, including lawyers and other repeat users of mediation). The author is the reporter for the Task Force.

⁸³ COSTANTINO & MERCHANT, *supra* note 52, at 117–33.

⁸⁴ For brief descriptions of the drafting process, see UNIF. MEDIATION ACT, Prefatory Note ¶ 5 (2001); Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 100–08.

⁸⁵ See generally Charles Pou, Jr., *Scissors Cut Paper: A "Guildhall" Helps Maryland's Mediators Sharpen Their Skills*, 26 JUST. SYS. J. 307 (2005) (describing the Maryland Program for Mediator Excellence).

disqualification agreement.⁸⁶ To date, they have been almost completely unsuccessful in selling the CL process to parties in nonfamily cases, in large part because of clients' resistance to the disqualification agreement.⁸⁷ Nonetheless, some CL practitioners persist in trying to convince parties to use CL in nonfamily cases, as if trying to fit a round peg in a square hole. This approach turns upside down the fundamental principle of dispute system design that disputing processes should be designed primarily to fit parties' needs and rather than practitioners' philosophical preferences.⁸⁸

C. Consideration of Wide Range of Policy Options and Recognition of the Limits of Regulation

In devising strategies to promote goals related to ADR, policymakers should consider a broad range of policy options and take advantage of complementary benefits of various options. Legal rules are powerful policy tools that are sometimes appropriate, though they can be crude instruments that sometimes have unintended adverse effects. Before proposing new or revised legal rules, policymakers should consider whether other tools for achieving ADR goals would be more appropriate. Policymakers should consider a range of policy goals, especially those promoting "reflective practice."⁸⁹

⁸⁶ For description of the disqualification agreement, see *supra* note 31 and accompanying text.

⁸⁷ See Hoffman, *supra* note 74 (describing extensive efforts in Cincinnati, Seattle, Massachusetts, Texas, and the Canadian province of Saskatchewan to promote CL in civil cases resulting in no more than eight civil CL cases). CL practitioners continue to develop CL practice outside the family context, in such areas as probate, employment, and medical malpractice cases. For example, the Electronic Data Systems Corporation recently announced that it is exploring use of CL. See COUNSEL TO COUNSEL, BUSINESS RELATIONSHIPS: EXPLORING COLLABORATIVE LAW (Sept. 2006), http://www.martindale.com/pdf/c2c/magazine/2006_Sep/C2C0906_BP_Branom.pdf. For further discussion of resistance to the disqualification agreement, see *infra* Part II.C.1.d.

⁸⁸ Lawyers and other dispute resolution professionals normally do not conduct needs assessments before developing or offering their services. In this respect, the failure of CL leaders to do so is not unusual. Nonetheless, in the face of strong market resistance, it would be appropriate and prudent for CL leaders to consider carefully why prospective clients are not buying what they are trying to sell. See *supra* note 87 and accompanying text.

⁸⁹ For definition and discussion of reflective practice, see *infra* Part II.C.5.

1. ADR Policy Goals and Options

In general, policymakers should explicitly identify and prioritize their goals at the outset of an ADR policymaking process, subject to revision as the process unfolds. Policymakers may try to achieve many possible goals, including but not limited to: (1) substantive and procedural fairness; (2) termination of disputes; (3) satisfaction of disputants' substantive interests; (4) satisfaction with the ADR process; (5) efficiency in the process (for the disputants and the public); (6) reduction of risk; (7) reduction of harm to disputants and others (including society generally); (8) provision of greater choice in dispute resolution processes to disputants (and dispute resolution professionals); (9) increase of disputants' capabilities in handling other disputes; (10) promotion of productive relationships; (11) satisfaction with services of dispute resolution professionals; (12) improvement of the culture of disputing for disputants, professionals, and society; and (13) compliance with social policies expressed in law.⁹⁰

There are many policy tools available to accomplish various ADR goals. These tools include, among others: (1) use of explicit agreements about appropriate dispute resolution goals and process in individual cases; (2) development of general protocols in practice communities; (3) training for disputants and professionals; (4) use of dispute referral mechanisms; (5) improvement of dispute resolution professionals' skills through peer consultation and mentoring; (6) provision of technical assistance for dispute resolution organizations; (7) education of the general public; (8) use of grievance mechanisms to deal with problems arising in ADR processes; (9) credentialing of dispute resolution professionals; (10) adoption and enforcement of legal rules; and (11) provision of sufficient resources to implement policies.⁹¹ As this list shows, enacting legal rules is one of many

⁹⁰ For a list of possible goals, see Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 349–50 (1989) (listing standards of quality of dispute resolution); Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. L., POL'Y & SOC'Y 393, 395–97 (1992) (listing potential benefits of private courts); John Lande, *Mediation Paradigms and Professional Identities*, MEDIATION Q., June 1984, at 19, 43–44.

⁹¹ For a list of possible policy options, see Lande, *supra* note 90, at 44; Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 309–12 (providing an excellent history and analysis of efforts to promote quality of mediation); Charles Pou Jr., *Enough Rules Already! Making Ethical Dispute Resolution a Reality*, DISP. RESOL. MAG., Winter 2004, at 19, 20–22 [hereinafter Pou, *Enough Rules Already!*].

possible ADR policy options.

2. Problems in Using Legal Regulation to Manage ADR

Policymakers should be cautious in using rules to govern ADR processes, especially in nonadjudicatory processes. A major benefit of alternative dispute resolution processes is to provide people with greater freedom to choose alternatives to court adjudication.⁹² As Professor Carrie Menkel-Meadow noted, ADR is a “field that was developed, in part, to release us from some—if not all—of the limitations and rigidities of law and formal legal institutions”⁹³ Nonetheless, many members of the current ADR movement operate implicitly based on “legal centralist” assumptions that society is and should be ordered primarily by state-created and enforced rules.⁹⁴ Law is only one means of social control—and often a relatively

In the context of governmental use of ADR, Charles Pou described “an ideal ADR world” as one that includes: (1) creativity, energy and leadership, (2) a predictable, accommodating legal framework, (3) understanding and acceptance of ADR, (4) adequate resources to experiment with useful process alternatives, (5) decisions that reflect sound dispute systems design theory and practice, and (6) long-term design and resource decisions that are based upon solid evaluation data. Charles Pou Jr., *Legislating Flexibility: Things that ADR Legislation Can and Cannot do Well*, DISP. RESOL. MAG., Summer 2001, at 7, 8. This list of goals and policy options is generally appropriate in other contexts as well.

⁹² See *supra* Part II.B.

⁹³ Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1, 1 (1991). Menkel-Meadow rues the development of a “‘common law’ or ‘jurisprudence’ of ADR.” *Id.* at 2. She seems primarily concerned about the potential for the legal system to legalize ADR and focus on promoting efficiency and rather than depriving people of the benefits of having options for producing better quality processes and outcomes. She writes that “[l]awyers may use ADR not for the accomplishment of a ‘better’ result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage.” *Id.* at 3. I share concerns about the risks of legalization of ADR processes. See John Lande, *How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 246–47 [hereinafter Lande, *How Much Justice Can We Afford?*]; John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 61–65 (1998); Lande, *Getting the Faith*, *supra* note 1, at 222–27. Of course, some legal regulation is appropriate, as discussed *infra* in Part II.C4, and regulation per se does not necessarily result in legalization.

⁹⁴ For an excellent summary of legal centralism, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 138–140 (1991). See also Marc

ineffective one. Professor Robert Ellickson describes five types of control, including personal ethics, contracts, social norms, organizational rules, and law.⁹⁵ He reviews empirical research refuting legal centralist assumptions in a wide range of situations, including studies finding that neighbors, business executives, insurance claims adjusters, housemaids, and retailers routinely ignored the law and, instead, used market interests, social norms, and self-help to deal with recurring problems.⁹⁶ Many dispute resolution professionals hold legal centralist assumptions, which may be due to the fact that many are law-trained and operate in and around the legal system. The fundamental ADR value of providing people with a range of alternatives to choose from—particularly alternatives to the legal system—suggests that policymakers should limit regulation of ADR to the minimum justified by a comprehensive policy analysis.

In addition to this philosophical value, there are many pragmatic reasons to limit regulation of ADR. The nature of ADR activities, especially in nonadjudicatory processes, is so complex and subject to so many contextual factors⁹⁷ that regulatory policies are often likely to have limited and unpredictable effects. Professor Macfarlane's excellent analysis of the limits of ethical codes in regulating mediation behavior is especially instructive.⁹⁸ She writes "[t]he current approach—largely limited to the development of

Galanter, *The Portable Soc 2; or, What to Do Until the Doctrine Comes*, in GENERAL EDUCATION IN THE SOCIAL SCIENCES: CENTENNIAL REFLECTIONS ON THE COLLEGE OF THE UNIVERSITY OF CHICAGO, 246, 250–53 (J.J. MacAloon ed., 1992); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. OF LEGAL PLURALISM, 1, 1–3 (1981). An alternative perspective is "legal pluralism," which recognizes that government courts are not the only or primary system of adjudication. See generally Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988).

⁹⁵ See ELLICKSON, *supra* note 94, at 130–32.

⁹⁶ *Id.* at 141–47.

⁹⁷ For a fine analysis of the complexity and contextual nature of mediation, see Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005). Professor Lisa Blomgren Bingham makes a compelling argument that the growth in ADR use is related to a great expansion in the availability of information in disputes and reduction in confidence in a single, official mechanism for analyzing the information and determining the truth. See generally Lisa Blomgren Bingham, *When We Hold No Truths to be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131 (tracing roots of modern ADR to increasing epistemological complexity).

⁹⁸ See generally Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49 (2002). Although many of these ethics codes are promulgated by private professional associations rather than government entities, the same logic applies to legal rules.

voluntary codes of conduct for mediators—consistently underestimates and oversimplifies the complexities of what it means to mediate ethically.”⁹⁹ The codes “reduce ethical choices to a set of generic principles, fastening on relatively uncontentious virtues for the mediation process, which appear in a virtually identical form across numerous codes of conduct.”¹⁰⁰ She argues that these codes embody at least three unrealistic assumptions about the nature of ethical dilemmas and the ways they actually arise in mediation. First, the codes assume that there are generally “right” and “wrong” responses across contextual settings. In practice, many of the challenging problems involve managing relationships rather than complying with specified requirements, there are wide variations in philosophy about what goals and techniques are appropriate and desirable, and there is great need for individual discretion.¹⁰¹ She writes that the “centrality of personal discretion to mediation practice means that ethical *practice* must respond to the unique situational constraints and possibilities of each mediation, whereas ethical *standards* are unable to do so.”¹⁰² Moreover, “a search for ‘right answers’ or ‘moral solutions’ to ethical dilemmas may undermine the hallmarks of facilitative mediation practice, namely contextual responsiveness, openness, and flexibility.”¹⁰³ Second, she argues that ethical codes generally focus on “snapshots” of the process and particularly the outcome, overlooking the ethical challenges in numerous “micro” decisions throughout a process.¹⁰⁴ As

⁹⁹ *Id.* at 50–51.

¹⁰⁰ *Id.* at 60. In their extensive critiques of the Model Standards of Conduct for Mediators, Jamie Henikoff and Michael Moffitt criticize the vagueness of the provisions. See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 91–94 (1997); see also Michael L. Moffitt, *The Wrong Model, Again: Why the Devil is not in the Details of the New Model Standards of Conduct for Mediators*, DISP. RESOL. MAG., Spring 2006, at 31; Moffitt, *supra* note 97, at 83–85, 96–97, 101–02 (criticizing “prescriptive acontextual” definitions); Pou, *Enough Rules Already!*, *supra* note 91, at 20 (arguing that “we should accept that handling complex ethical issues will seldom involve ‘looking up the answer.’”). For a defense and celebration, respectively, of the revised Model Standards, see Joseph B. Stulberg, *The Model Standards of Conduct: A Reply to Professor Moffitt*, DISP. RESOL. MAG., Spring 2006, at 34; Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J. L. 195 (2006).

¹⁰¹ Macfarlane, *supra* note 98, at 61–65 (giving an example of differences between mediators in ways of defining and dealing with coercion).

¹⁰² *Id.* at 64.

¹⁰³ *Id.* at 65. I would argue that in virtually all approaches to mediation there is a need for responsiveness, openness, and flexibility.

¹⁰⁴ *Id.* at 65–68.

an example, she points to the difficulties in assessing parties' self-determination throughout the process, suggesting that parties may feel coerced by mediators' encouragement to stay in the process during difficult negotiations even though the parties may assent to the ultimate result. Third, she argues that the codes are unable to manage conflicts between principles such as between self-determination and impartiality, when a mediator's action to help one party analyze a problem may be interpreted as bias against another party.¹⁰⁵ Conceivably, the codes might offer a hierarchy of values to prioritize conflicting principles, but she argues that the complex nature of the interactions and mediators' roles makes that unworkable.¹⁰⁶

Since legal rules involve the potential for legal consequences, the scope of behavior to be regulated must be limited because of practical problems of enforcement. Professor Gerald Wetlaufer gives the following description about the limitations of using legal rules to prohibit lawyers from lying in negotiation:

[E]thics is different from and more demanding than law, including the law of professional self-regulation. This difference can readily be understood because law, unlike ethics, must be implemented from a perspective external to the individual and must deal with all of the problems related to such implementation. Law must, for instance, come to terms with the problem of what can be known about past events or about the motives of a person charged with breaching some legal duty. It must take account of the possibility of error and, because it is invoked after the fact, law must take account of such values as the stability of transactions. It must also take account of the transaction costs associated with doing justice. Accordingly, the law may permit certain deceptions that have had little or no effect, or that are difficult or impossible to prove. The fact that the law permits these deceptions is not an authoritative pronouncement that these lies are ethically unobjectionable. It is, instead, an accommodation to those costs and practicalities that bear upon the law but not upon ethics.¹⁰⁷

Thus, the scope of effective regulation is limited by difficulties implementing enforceable rules. Moreover, people—especially lawyers—do not simply respond to rules by behaving as intended by the rulemakers. Professor Stewart Macaulay writes that people:

[C]ope with law and cannot be expected to comply passively. Many people

¹⁰⁵ *Id.* at 68–70.

¹⁰⁶ *Id.* at 69–70.

¹⁰⁷ Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1234–35 (1990) (footnotes omitted).

are able to ignore most legal commands, or redefine them to serve self-interest or "common sense" . . . Sometimes, however, the command of the law rings loud and clear and has direct impact on behavior. In short, the role of law is not something that can be assumed but must be established in every case.¹⁰⁸

"Thinking like a lawyer" does not refer to lawyers pondering how they can assure that their clients obey the law. Rather, it generally means that lawyers strategize how they can accomplish their clients' objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the US. Thus would-be ADR regulators should consider how lawyers are likely to react to—and possibly "game"—any new rules as they try to accomplish their clients' goals.

Rules are easiest to enforce when the behaviors to be regulated are easily detectable and objectively determinable. When behaviors are complex and ambiguous, rules are harder to enforce effectively. Consider the issue of "good faith" in mediation. Good faith is like mom and apple pie—it's hard to be against them. But that does not mean that it is a good idea to legislate them. Various statutes and rules require people to mediate in good faith, almost always without defining the term.¹⁰⁹ Many people think that they know bad faith when they see it. They "know" that bad faith in mediation is when one side—the other side—refuses to make a new offer or what they view as a "reasonable" offer.¹¹⁰ This conduct clearly grieves some litigants, lawyers, and judges who would like the courts to sanction the alleged offenders. In virtually all the final reported opinions on this issue, however, the courts have decided that this conduct is not sanctionable bad faith.¹¹¹ The courts have decided that it would be inappropriate to sanction this behavior, which is impossible to adjudicate without evidence about communications in

¹⁰⁸ Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 153–54 (1984).

¹⁰⁹ See Lande, *supra* note 49, at 77–81. Similarly, Fairman's proposal would require CL lawyers to act in "good faith" and use "cooperative strategies," without defining these terms. See Fairman, *supra* note 25, at 117–19 (proposed rule 2.2(a), (d) and comments (3), (8)). Peppet's proposal also uses the problematic term "good faith." See Peppet, *supra* note 28, at 523 (permitting lawyers to commit to "negotiate in good faith by, among other things, abstaining from causing unreasonable delay and from imposing avoidable hardships on another party for the purpose of securing a negotiation advantage").

¹¹⁰ Lande, *supra* note 49, at 92.

¹¹¹ *Id.* at 82–85.

mediation and the participants' state of mind.¹¹² Even proponents of good faith rules recognize that judicial second-guessing of participants' states of mind would be an inappropriate judicial encroachment into the mediation process.¹¹³ As a result, the judicial interpretation of "good faith" has come to mean attendance at mediation (possibly with a representative having "sufficient" negotiation authority) and submission of any required pre-mediation materials.¹¹⁴ The result is that the good faith rules do not prohibit what people think of as bad faith. Ironically, because of the vagueness of the concept and problems of enforcement, parties who intend to act in bad faith are unlikely to be deterred and could actually use the rule to harass others who act appropriately.¹¹⁵ The ABA Section of Dispute Resolution appropriately adopted a resolution recommending that to address problematic behavior in mediation, courts should not adopt rules that would prohibit conduct that is not objectively determinable. In addition, the resolution recommends that courts affirmatively engage in nonregulatory activities including collaborative system design efforts and establishment of educational programs for participants about mediation procedures.¹¹⁶ Thus, rather than using the legal centralist assumption that courts should try to stop "bad faith" merely by imposing sanctions for violation of rules, the ABA Section of Dispute Resolution wisely recommends a more comprehensive approach that includes limited regulation along with important nonregulatory policies.

3. Problems with Legal Definitions

Some people suggest that regulation is appropriate to establish ADR process definitions and thus create legitimacy and build a sense of security about particular dispute resolution processes.¹¹⁷ In my view, these can be desirable benefits of appropriate regulation but do not justify regulation by themselves. Dean Bryant Garth and Professor Austin Sarat distinguish

¹¹² *Id.* at 86–89.

¹¹³ *Id.* at 82–92.

¹¹⁴ *Id.* at 82–85.

¹¹⁵ *Id.* at 98–102.

¹¹⁶ *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, A.B.A. SEC. DISP. RESOL., <http://www.abanet.org/dispute/webpolicy.html#9> (last visited Feb. 5, 2007). This author helped draft the resolution.

¹¹⁷ This idea was suggested by several people who had read earlier drafts of this Article or heard presentations about it.

“instrumental” and “constitutive” approaches in analyzing law. An instrumental approach focuses on the results attributable to law, whereas a constitutive approach “sees law more as a pervasive influence in structuring society than as a variable whose occasional impact can be measured.”¹¹⁸ From a constitutive perspective:

[L]aw is seen as a way of organizing the world into categories and concepts which, while providing spaces and opportunities, also constrains behavior and serves to legitimate authority. Rather than asking what the Clean Air Act accomplished, this approach focuses more on what it means to frame the problem of air quality in legal terms, and how that framing structures both thought and action with respect to the quality of the air that we breathe¹¹⁹

The two analytic approaches are not mutually exclusive. Indeed, one can identify both instrumental and constitutive impacts of many laws such as the Clean Air Act. In the dispute resolution context, a rule authorizing courts to order cases to participate in ADR processes may have both the instrumental impact of inducing people to use the ADR processes as well as a constitutive impact of creating definitions of the processes and legitimizing them. As a matter of policymaking, this Article argues that we should enact rules only if there is a legitimate instrumental purpose for the rules and that a constitutive purpose by itself is an insufficient justification. Governmental authority is a powerful and precious resource that is easily subject to abuse. Thus it should be used cautiously and only when justified.

Consider some problems of definitions that might be enacted purely for constitutive value. In the dispute resolution field, there are great ideological conflicts over process definitions.¹²⁰ A definition carved into the “stone” of a

¹¹⁸ Bryant G. Garth & Austin Sarat, *Studying How Law Matters: An Introduction*, in *HOW DOES LAW MATTER?* 2 (Bryant G. Garth & Austin Sarat eds., 1998). A constitutive approach reflects the insights of sociological theorists of institutionalism. See *supra* notes 7–10 and accompanying text.

¹¹⁹ Garth & Sarat, *supra* note 118, at 2–3.

¹²⁰ See, e.g., Lande, *supra* note 56, at 854–57. Lande writes:

[T]he mediation market is quite diverse and currently in the process of institutionalization. Theorists and market participants are struggling to develop what they hope will become taken-for-granted definitions. These arguments over terminology are not “just” academic exercises; these debates shape the practices of mediators and lawyers regarding what it means to be a “good” practitioner, referring to shared meanings and norms within one’s practice community.

Id. at 857.

rule is likely either to be so vague as to be meaningless or to favor some ideological contestants over others and thus legalize an orthodoxy.¹²¹ Presumably, many proponents of a legalized definition hope to have some instrumental impact on practice. For example, proponents of facilitative mediation who disapprove of evaluative mediation have long pleaded, "Just don't call it mediation."¹²² If a rule would define mediation solely as facilitative mediation, it is hard to believe that most evaluative mediators would change their practices to conform to the legal definition or that most people would stop recognizing their work as mediation.¹²³ Although some practitioners are obviously very attentive to the rules, undoubtedly many others are not and respond more to demands for evaluation by mediation users and norms of local mediation culture.¹²⁴ Professor Riskin writes that "[i]t is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article."¹²⁵ Rulemakers are likely to be similarly unsuccessful in adopting definitions of dispute resolution processes. Although it may be tempting to try to harness the power

¹²¹ Sociologist Andrew Abbott argues that legal definitions of professional boundaries are quite rigid and "[a]s a result of this extreme formality, the legally established world of jurisdiction is a fixed, static world that rejects the living complexity of professional life." ABBOTT, *supra* note 56, at 64; *see also supra* notes 60, 97-106 and accompanying text for discussion of problems related to vagueness and orthodoxy in dispute resolution doctrine.

¹²² *See* Lande, *supra* note 56, at 855.

¹²³ For a fascinating account of Florida's and Minnesota's efforts to grapple with the difficulties of writing rules to define and regulate evaluative mediation, *see* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 33-59 (2001).

¹²⁴ *See* Lande, *supra* note 56, at 881-86.

¹²⁵ Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996). Professors Kovach and Love respond that France clarified the definition of what is required for a bakery to be a "real" boulangerie. *See* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 76 (1998). As noted above, regulation is likely to be more effective if the subject is easily observable and objectively determinable, such as with food standards. *See supra* notes 109-16 and accompanying text. Even when those conditions apply, as with pizza and bread, it may be hard for a legal definition to change deeply embedded cultural practices and terminology. It is especially hard to create practical and meaningful definitions of complex dispute resolution processes that unfold over time. *See supra* notes 106-16 and accompanying text.

of legal authority solely for constitutive purposes, policymakers should avoid that temptation. Nonregulatory policies to promote reflective practice¹²⁶ are more likely to be effective in causing dispute resolution practices to conform with professional norms.

A more pragmatic problem is that legislative drafting is often crude and prone to unintended consequences. Professor Michael Moffitt argues that rulemakers sometimes use broad “prescriptive-acontextual” definitions of processes (e.g., “mediation”) when they would do better to focus specifically on what procedures are (or are not) entitled to regulatory benefits such as confidentiality, immunity, or access to courts.¹²⁷ Although definitions might seem innocuous, they can have major impact on the nature of the process being regulated. The drafting of the Uniform Mediation Act provides a good example of how a definitional issue became very controversial. Many mediators take it for granted that mediators must be impartial and, thus, impartiality should be an essential element of a legal definition of mediation.¹²⁸ After extensive consultation with various stakeholders, the drafters of the Act determined that “some mediators preferred to be partial, . . . impartiality is difficult to define and to achieve, and . . . mediators might be liable if they failed to be impartial.”¹²⁹ Thus, the drafters decided that “an operative term such as impartial should not be a part of the definition and, if included, should be addressed later in the Act;” in addition, “including impartiality in the definition of mediator might cause the parties to lose the confidentiality of the Act if it was later determined that the mediator was partial and the court concluded therefore that a mediation did not occur.”¹³⁰ Thus, including an apparently innocuous element in a definition could have significant legal consequences.

In the CL context, the two CL statutes enacted to date both include “good faith” requirements.¹³¹ As noted above, this seemingly innocuous provision could be very problematic.¹³² Another example is that the definition of CL in the North Carolina statute refers to a procedure involving a husband and

¹²⁶ See *infra* Part II.C.5.

¹²⁷ Moffitt, *supra* note 97, at 94–97.

¹²⁸ See Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 280–82 (2002).

¹²⁹ *Id.* at 280–81.

¹³⁰ *Id.* See also Reuben, *supra* note 84, at 130–31.

¹³¹ See N.C. GEN. STAT. § 50–71 (2006); TEX. FAM. CODE ANN. § 6.603(b) (Vernon 2006).

¹³² For discussion of problems arising from a “good faith requirement” in mediation, see *supra* notes 109–16 and accompanying text.

wife.¹³³ Thus, this statutory definition effectively denies unmarried couples the legal benefits that are provided to married couples.¹³⁴

Although some problems of legal definitions could be solved through thoughtful drafting using dispute system design principles, the legislative process is often not conducive to such a careful procedure. It is possible to correct legislative mistakes, but the consequences of regulatory errors can be substantial and the amendment process is often difficult. This suggests the wisdom in exercising great caution in the use of regulation as an ADR policymaking tool.

4. *Appropriate Regulation of ADR*

Although nonregulatory policy options are often optimal, regulatory options are appropriate in several types of situations.¹³⁵ First, rules are needed to regulate—and restrict—the use of information generated during ADR processes in litigation. For example, statutes like the Uniform Mediation Act are needed to protect the integrity of both mediation and litigation by restricting use of certain mediation communications in litigation. Without such a legal restraint, many litigants and lawyers would be less likely to share information needed to reach agreement in mediation. Moreover, use of mediation communications at trial would taint the legal process and results by basing court decisions on inappropriate evidence.¹³⁶ In

¹³³ See N.C. GEN. STAT. § 50-71(1) (2006).

¹³⁴ Similarly, the definition of CL in the Texas statute refers to a process for dissolution of marriage. See TEX. FAM. CODE ANN. § 6.603(b) (Vernon 2006). Another Texas statute sanctions CL in cases involving parent-child relationships, but it does not affect unmarried couples who want to use CL to address other issues. See TEX. FAM. CODE ANN. § 153.0072 (Vernon 2006).

¹³⁵ The principles proposed in this Article parallel Moffitt's proposal for increased customization of litigation procedures. See Moffitt, *supra* note 68. Both are designed to increase choice of dispute resolution procedures. Both recognize that there are appropriate limits to the choices that should be permitted. The limits are designed to protect the fundamental integrity of the structure and operation of the respective dispute resolution systems. Moffitt argues that litigants' discretion to customize litigation procedures should be limited to (1) be consistent with constitutional and statutory limits of the legal system, (2) protect the public's interest in litigation, and (3) prevent harm to nonlitigants. See *id.*

¹³⁶ Of course the protection is not absolute because statutes permit use of mediation communications at trial in limited circumstances. See, e.g., UNIF. MEDIATION ACT § 6 (2001) (exceptions to mediation privilege). Professors James Coben and Peter Thompson found 1,223 cases in Westlaw databases that involved significant mediation issues between 1999 and 2003. See James R. Coben & Peter N. Thompson, *Disputing Irony: A*

the arbitration context, Professor Richard Reuben argues that arbitration communications should normally be inadmissible in court and nondiscoverable, subject to certain exceptions.¹³⁷ In the context of Collaborative and Cooperative Law, it may be appropriate for states and courts to adopt evidentiary rules regulating use of information produced in those processes.¹³⁸

A second, related category of issues appropriate for regulation involves rules governing the relationship between ADR processes and the courts. For example, the Federal Arbitration Act and the Revised Uniform Arbitration Act (RUAA) regulate the nature of contracts to arbitrate that the courts will enforce and what actions the courts will take in relation to the arbitration process.¹³⁹ These provisions might include definitions of enforceable agreements, provisional remedies the courts could grant, qualifications of arbitrators, and the nature of awards.¹⁴⁰ Arbitration generally involves legally binding adjudication. Therefore, it is appropriate for laws to provide greater regulation of those processes than nonadjudicatory processes because parties have greater control over the result in the latter. Even in mediation, however, it is necessary and appropriate to establish rules about compliance with duties to mediate and enforcement of agreements purportedly reached in

Systematic Look at Litigation About Mediation, 11 HARV. NEGOT. L. REV. 43, 51–52 (2006). They found that 130 cases involved issues of whether to permit testimony or discovery from mediation participants and that the courts declined to protect confidentiality in 60 of those cases. *Id.* They also found that in 30% of all the cases in the database, there were mediation disclosures that were not apparently contested by the parties, mediators, or courts. *Id.* at 58–59. It is not clear what proportion of these disclosures were appropriately permitted under applicable laws or agreement of the parties. If litigants and lawyers come to believe that mediation communications are inappropriately used in litigation on a regular basis, they are likely to lose confidence in the mediation process and behave more defensively.

¹³⁷ See generally Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 55 U. KAN. L. REV. 1255 (2006) (proposing to raise the burden of proof for admission of evidence sought from arbitration proceedings).

¹³⁸ Two states have already adopted such statutes regarding Collaborative Law. See Fairman, *supra* note 25, at 105–07. For further discussion of confidentiality issues in CL, see *infra* note 253 and accompanying text. For definition of Cooperative Law, see *supra* note 62.

¹³⁹ See Fed. Arbitration Act, 9 U.S.C. § 2 (2006); REV. UNIF. ARB. ACT § 6 (2001).

¹⁴⁰ See generally Fed. Arbitration Act, 9 U.S.C. § 1 et seq. (2006); REV. UNIF. ARB. ACT (2001).

mediation.¹⁴¹ For example, rules prohibiting enforcement of settlements obtained through coercion are important to protect the integrity of negotiation processes as well as the court system.¹⁴² Similarly, in CL, it is appropriate to enact rules if courts create exemptions from normal court case management systems¹⁴³ or to prescribe conditions for enforcing agreements reached in CL processes.¹⁴⁴ Third, it is appropriate to legally regulate

¹⁴¹ In a comprehensive review of litigation about mediation, Coben and Thompson found the largest categories of litigation involved enforcement of mediated settlement agreements and duties to mediate. See Coben & Thompson, *supra* note 136, at 56–57.

¹⁴² A new rule in the Model Code of Judicial Conduct states, “A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.” MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.6(B) (Report Feb. 2007), http://www.abanet.org/judiciaethics/house_report.pdf (last visited Jan. 15, 2007). A comment to that rule emphasizes the importance of protecting the right to trial: “The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.” *Id.* at cmt. 1. Similarly, Standard I of the Model Standards of Conduct for Mediators states, “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” ABA ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 2. These provisions in the Model Code and Model Standards are appropriate statements of principle, but are unlikely to reduce coercion by themselves because it is hard to define coercion—which is not defined in these provisions. Moreover, many people believe that some degree of pressure is acceptable and even desirable. See generally Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273 (2005) (analyzing coercion in mediation); Peter N. Thompson, *Enforcing Rights Generated In Court-Connected Mediation—Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 527–35 (2004) (analyzing duress and undue influence in mediation); Welsh, *supra* note 123, at 59–78.

¹⁴³ See, e.g., TEX. FAM. CODE ANN. § 6.603(e) (Vernon 2006) (stating that when notified that a case is a CL case at least 30 days before trial, courts may not “(1) set a hearing or trial in the case; (2) impose discovery deadlines; (3) require compliance with scheduling orders; or (4) dismiss the case”).

¹⁴⁴ Despite the fact that CL theory prescribes use of interest-based negotiation, the disqualification agreement creates pressures to settle that could easily devolve into coercion at “crunch time.” See Lande, *supra* note 29, at 1364 (“CL theory calls for interest-based negotiation, but the disqualification agreement increases the incentive to continue negotiations and reach any agreement, not merely agreements satisfying the parties’ interests.”). The courts should not enforce agreements reached as a result of coercion in CL. Although it may be appropriate to adopt a rule precluding enforcement of coerced agreements, it may be difficult to enforce and may not be as effective as

professional conduct in ADR processes to protect consumers' interests by defining the professionals' duties, dealing with issues such as requirements of informed consent and prohibitions against conflicts of interest. Similarly, regulation to protect the interests of nonlitigants is appropriate, such as requirements to avoid taking advantage of nonlitigants.¹⁴⁵ Issues of consumer protection are appropriate for regulation because consumers rely on professionals and may need the power of government (including enforcement of professional associations' rules) to prevent and remedy exploitation by the professionals. For some issues, such as requirement of informed consent and avoidance of conflicts of interest, it may be appropriate to rely primarily on regulation because the behavior involved can often be determined objectively without great difficulty. Although other issues, such as prevention of coercion, may be appropriate for regulation, a strategy relying exclusively on regulation may not be effective because of difficulties in detection and enforcement. In such situations, it may be appropriate to develop a strategy that combines regulation and other policy tools.

Fourth, it is appropriate to adopt default rules when a substantial number of people have actually encountered significant problems because their ADR agreements were silent or ambiguous about particular issues. It may be tempting for some policymakers (and commentators) to prescribe default rules to reflect their own values and interests even when there is no record of significant problems that would be solved by such rules. In general, under our common law system for developing legal rules, it is generally better for policymakers to refrain from adopting such ADR rules unless and until there is demonstrated need. The RUAA is a good example of appropriate use of default rules. The Prefatory Note states that "[i]n most instances the RUAA provides a default mechanism if the parties do not have a specific agreement on a particular issue"¹⁴⁶ and specifies fourteen issues requiring such default rules.¹⁴⁷ For example, Section 10 of the RUAA includes a default provision

nonregulatory policies in achieving the desired policy goals. *See supra* note 142 and accompanying text.

¹⁴⁵ *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1–4.4 (2002) (regulating truthfulness of statements to third parties, communication with represented and unrepresented parties, and respect for rights of third persons); MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VII.A (2005) (prohibiting misleading advertising).

¹⁴⁶ REV. UNIF. ARB. ACT Pref. Note (2001).

¹⁴⁷ Referring to the Uniform Arbitration Act, the predecessor to the RUAA, the Prefatory Note states:

The UAA did not address many issues which arise in modern arbitration cases. The statute provided no guidance as to (1) who decides the arbitrability of a dispute and by what criteria; (2) whether a court or arbitrators may issue provisional

authorizing arbitrators to consolidate separate arbitration proceedings.¹⁴⁸ The comment to that section states that the RUAA includes this because “it is likely that in many cases one or more parties, often non-drafting parties, will not have considered the impact of the arbitration clause on multiparty disputes.”¹⁴⁹ Similarly, Sections 15 and 17 establish default rules authorizing arbitrators to regulate discovery, issue subpoenas, make protective orders, conduct various pre-hearing proceedings to rule on evidentiary issues, and make summary dispositions.¹⁵⁰ Arbitration agreements may not address these issues and thus the default provisions are useful to fill such gaps in those agreements.

5. Policies Promoting Reflective Practice

If ADR policymakers should consider legal regulation as a limited and last resort for developing new policies, what should be the initial and primary approach? In general, this Article recommends using system design processes that engage interested stakeholders to consider a wide range of policy options as described above.¹⁵¹ It is beyond the scope of this Article to provide a general analysis of all those options. One policy goal and associated set of policy options are worth special mention here because they

remedies; (3) how a party can initiate an arbitration proceeding; (4) whether arbitration proceedings may be consolidated; (5) whether arbitrators are required to disclose facts reasonably likely to affect impartiality; (6) what extent arbitrators or an arbitration organization are immune from civil actions; (7) whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding; (8) whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences and otherwise manage the arbitration process; (9) when a court may enforce a preaward ruling by an arbitrator; (10) what remedies an arbitrator may award, especially in regard to attorney’s fees, punitive damages or other exemplary relief; (11) when a court can award attorney’s fees and costs to arbitrators and arbitration organizations; (12) when a court can award attorney’s fees and costs to a prevailing party in an appeal of an arbitrator’s award; and (13) which sections of the UAA would not be waivable, an important matter to insure fundamental fairness to the parties will be preserved, particularly in those instances where one party may have significantly less bargaining power than another; and (14) the use of electronic information and other modern means of technology in the arbitration process.

Id.

¹⁴⁸ *See id.* § 10.

¹⁴⁹ *Id.* at cmt 3.

¹⁵⁰ *See id.* §§ 15, 17.

¹⁵¹ *See supra* Part II.A.

are particularly relevant to CL. Professor Macfarlane advocates promotion of “reflective practice,” as conceptualized by Donald Schön:

This approach to professional education and training attempts to bridge the gulf between the acquisition of professional knowledge and competence in practice. It does so by challenging the traditional assumption that professional knowledge can be systematized and taught as facts, rules, and procedures which can then be instrumentally applied to practice situations. Instead, what Schön describes as “professional artistry” requires the capacity to deal with unique and uncertain areas of practice by drawing on past experiences and by constantly experimenting and revising. A reflective-practice model requires each practitioner to develop a capacity for reflective self-analysis of their effectiveness in practice situations and to adopt a systematic approach to the learning that accrues. Reflective practice increases professional effectiveness by enhancing awareness of the impact of contextual factors and constraints, raising the level of responsiveness and flexibility, and emphasizing self-growth which builds on experience. Research consistently demonstrates that the individual practitioners considered by their peers to exemplify excellence are significantly better than both novices and their more experienced colleagues at successfully integrating their new experiences into their existing models of action and knowledge. Simply put, they are better at learning from their experiences because of their superior ability to analyze and synthesize those lessons.¹⁵²

She concludes that:

[P]utting the principles of reflective practice *into* practice requires the conscious nurturing of a collaborative professional environment in which personal experiences and choices are shared in a continuous, self-critical, non-defensive, and open dialogue. It needs practitioners—new and old,

¹⁵² Macfarlane, *supra* note 98, at 72–73 (footnotes omitted). Mediator Howard Bellman makes a similar point in a lovely essay analyzing the “improvisational art” of mediation by comparing it to improvisational jazz music. See Howard Bellman, *Improvisation, Mediation, and All That Jazz*, 22 NEGOT. J. 325, 325–27 (2006) (book review). In both contexts, performers work “in the moment” in ensemble settings. The performers must have a good “ear” to hear what is going on so they can choose appropriate responses, sometimes creating new moves that have not been done before. Although performers work from a set of conventions that are often learned over long periods of study and practice, skillful performances require quick intuition and judgment that cannot be set out in advance like a musical score or procedural script for mediators. See *id.*; see also Special Section, *Improvisation and Negotiation*, 21 NEGOT. J. 411 (2005); BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (Daniel Bowling & David A. Hoffman eds., 2003).

PRINCIPLES FOR POLICYMAKING ABOUT COLLABORATIVE LAW

experienced and less experienced—to talk and write analytically and self-critically about their approaches to ethical dilemmas.¹⁵³

This is similar to Professor Craig McEwen's description of "communities of practice" that exercise "collegial control" in using various policy tools to improve the quality of practice.¹⁵⁴ For example, the community mediation field has institutionalized continuous reflective educational development.¹⁵⁵ Private professional mediators generally do not participate in such continuous reflective education, although some courts and practitioners have developed a few peer consultation programs.¹⁵⁶ Part of the genius of CL is its institutionalization of continuous training, in part through requirements of some groups that members attend local group meetings.¹⁵⁷

¹⁵³ Macfarlane, *supra* note 98, at 87.

¹⁵⁴ See Craig McEwen, *Giving Meaning to Mediator Professionalism*, DISP. RESOL. MAG., Spring 2005, at 3 (distinguishing collegial control from control by organizations, markets, and rules).

¹⁵⁵ The National Association for Community Mediation (NAFCM) issued the following statement:

NAFCM believes that quality assurance is a process rather than an end and is best supported through organizational self-reflection, careful systems design, collaboration with the community, and continuous improvement.

1. NAFCM believes that the most crucial skill of mediators is found in their ability to apply theoretical knowledge in a variety of diverse, live, real-world situations. . . .
2. NAFCM believes that a whole-systems approach to quality assurance is the best possible method. Community mediation centers provide that approach through: (a) The center's on-going relationship with the trained volunteer mediators, the community, and referral sources; (b) A commitment to a continuous growth and learning process for the volunteers, centers and the community; and (c) The translation of current mediation theory and methodology into quality practice that is congruent with the diverse cultures it serves.

National Association for Community Mediation, Quality Assurance Statement, <http://www.nafcm.org/pg9.cfm#statement> (last visited July 15, 2006).

¹⁵⁶ See, e.g., Edward Blumstein & Patricia B. Wisch, *Who Nurtures the Nurturer? A Model of a Peer Support Group*, 9 MEDIATION Q. 267 (1992) (describing operation of mediators peer support group); Howard Herman & Jeannette P. Twomey, *Training Outside the Classroom: Peer Consultation Groups*, DISP. RESOL. MAG., Fall 2005, at 15 (describing Mediator Peer Consultation Groups developed by the Virginia Mediation Network and the Virginia Association for Community Conflict Resolution as well as the Advanced Mediation Practice Groups operated by the ADR Program of the U.S. District Court for the Northern District of California).

¹⁵⁷ See MACFARLANE, *supra* note 59, at 6. Of course the existence of such groups is no guarantee that they will provide the kind of reflective practice that Macfarlane advocates and, indeed, she found that in "each [CL] centre, there appears to be a strong

Such efforts to promote reflective practice seem very promising and should be considered whenever training of dispute resolution professionals is likely to be a major factor in the success of a policy strategy.

Considering the subtle, complex, and contextual nature of ADR processes and major differences of philosophy within the field,¹⁵⁸ no single policy tool will be completely effective in solving major problems. To be most effective, policymakers should start with an assumption that they will need a comprehensive strategy combining various policy tools. In the context of such a strategy, problems of over-reliance on legal rules can be reduced.¹⁵⁹

D. Development of Appropriate Relationship Between ADR Innovations and the Contemporary Dispute Resolution System

Members of the ADR field should acknowledge and appreciate the significant social value that the legal system contributes to U.S. society. They should help to correct problems in the legal system by helping develop innovations in legal processes and offering a range of distinct ADR alternatives to meet the needs of litigants and society.¹⁶⁰

Professor David Luban catalogs a variety of public goods produced through the legal system, including development of legal rules and precedents, discovery and publication of important facts, opportunities for intervention by persons not party to lawsuits, structural transformation of

commitment to establishing a uniformity of practice—whatever the practice model is for that particular group.” *Id.* at 7. Hopefully various CL groups will increase their appreciation of the complexities of the problems and legitimate variations in philosophy and practice. For a thoughtful analysis of CL training, see Richard William Shields, Collaborative Family Law Training: From Making the Paradigm Shift to Experiencing Transformative Learning (forthcoming 2007) (unpublished Ph.D. Dissertation, University of Toronto) (on file with author).

¹⁵⁸ For example, in mediation, three major philosophies are reflected in the facilitative, evaluative, and transformative approaches. See Bush, *supra* note 56, at 982–84; LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 286–307 (3d ed. 2005). Similarly, Macfarlane found differences in approach between CL lawyers which she described as: (1) traditional legal advisors who commit to cooperation, (2) lawyers as “friend and healer,” and (3) “team players.” MACFARLANE, *supra* note 59, at 7–12.

¹⁵⁹ McEwen recognizes the value of quasi-regulatory policy tools such as practice standards but argues that they should be “the starting rather than the ending point.” McEwen, *supra* note 154, at 6. In a reflective practice process, CL practitioners can use general prescriptions in legal ethics and CL practice standards to grapple with the complexities of CL practice.

¹⁶⁰ See generally David A. Hoffman, *Courts and ADR: A Symbiotic Relationship*, DISP. RESOL. MAG., Spring 2005, at 2.

public and private institutions, and promotion and enforcement of private settlements.¹⁶¹ The legal system promotes economic activity, deters health and safety hazards, compensates for injuries, protects basic civil rights, and provides an important forum for debating and establishing social norms. It is also a critical alternative to negotiation when parties need to threaten use of state power to resolve their disputes privately.¹⁶² Indeed, much private negotiation occurs only because parties can threaten to use the courts to validate and enforce legal claims.

Many of us take the benefits of our legal system for granted and appreciate them only when our legal protections seem to be threatened. Taking these benefits for granted contributes to an imbalanced understanding of the legal system with excessive focus on its shortcomings. Moreover, it reinforces an orchestrated campaign to undermine the legitimacy of the legal system, which is essential for the system to function properly.¹⁶³ There certainly are significant shortcomings in the legal system that deserve attention and correction. Indeed, much of the motivation for development of the ADR field has been to provide dispute resolution options that avoid these shortcomings.¹⁶⁴ Unfortunately, a significant subset of the ADR field—

¹⁶¹ See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–26 (1995).

¹⁶² *Id.*; see also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); Lande, *supra* note 55, at 205–06.

¹⁶³ Professor Marc Galanter uses the term the “jaundiced view” to describe the following distorted and corrosive image of the legal system:

Our civil justice system was widely condemned as pathological and destructive, producing untold harm. A series of factoids or macro-anecdotes about litigation became the received wisdom: America is the most litigious society in the course of all human history; Americans sue at the drop of a hat; the courts are brimming over with frivolous lawsuits; resort to courts is a first rather than a last resort; runaway juries make capricious awards to undeserving claimants; immense punitive damage awards are routine; litigation is undermining our ability to compete economically.

Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 644–45 (1994). This jaundiced view results from a combination of sources, including self-interested campaigns of economic interests trying to limit the control of their activities through the legal system. See generally Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) (describing recent critiques of law); Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 STUDIES IN LAW, POL. & SOC’Y 95 (1991) (describing concerted campaign to demonize litigation).

¹⁶⁴ See RISKIN ET AL., *supra* note 158, at 12–14.

including some CL practitioners—denigrate the courts and litigation.¹⁶⁵ For example, some mediators exaggerate problems with litigation to press parties to settle, which is inappropriate and should be discouraged.¹⁶⁶ In the CL context, Professor Macfarlane found that the most commonly expressed motivation of CL practitioners was an “abhorrence of litigation.”¹⁶⁷ She quotes a CL lawyer describing as typical a situation in court where “an idiotic jerk of a judge who probably has an IQ of about 10 decides what should happen to this family.”¹⁶⁸ Although this certainly does not reflect the views of all CL practitioners, CL leaders should discourage practitioners from treating lawyers and judges disrespectfully and from describing litigation as inevitably harmful. Litigation and court adjudication can certainly create or exacerbate problems for disputants—especially in family cases—and should normally be used as a last resort. Unfortunately, some cases are not appropriate for other processes—for example, where parties are seriously dangerous or untrustworthy and seek advantage through intimidation. We must rely on judges and other dispute resolution professionals needed to make the legal system function properly, and we should treat them with respect. This would be easier if dispute resolution professionals would identify themselves as members of the system as a whole and not merely as members of their preferred part of it.¹⁶⁹

Policymakers should also be attentive to the opposite problem—cooptation of ADR innovations by the legal system.¹⁷⁰ The legal system is remarkably flexible and capable of absorbing innovations, which is a mixed blessing. This has led to incremental improvements in the legal system as it has adopted ADR innovations as part of the system.¹⁷¹ However, this incorporation of ADR creates risks that the alternative processes will lose the distinctive features that make them valuable as alternatives.¹⁷²

¹⁶⁵ See Hoffman, *supra* note 160, at 2.

¹⁶⁶ *Id.* (magazine column by chair of the ABA Section of Dispute Resolution urging dispute resolution professionals to support the court system despite its imperfections).

¹⁶⁷ MACFARLANE, *supra* note 59, at 17.

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* Part II.A.

¹⁷⁰ See, e.g., Patrick G. Coy & Timothy Hedeon, *A Stage Model of Social Movement Co-Optation: Community Mediation in the United States*, 46 SOC. Q. 405 (2005); Menkel-Meadow, *supra* note 93.

¹⁷¹ See *supra* note 1.

¹⁷² See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (describing the lawyer’s “standard philosophical map”); see also Lande, *How Much Justice Can We Afford?*, *supra* note 93, at 246–47 (describing risks that courts will unconsciously apply Riskin’s “standard philosophical map” in setting ADR policy).

Simply opposing all potential cooptation by retaining the original features of an innovative model is not a good approach, however, as this is unlikely to continue satisfying the original needs or to assure the survival of the ADR process. In the CL context, this is related to the claim by many Collaborative practitioners that their model is a "paradigm shift,"¹⁷³ a term from Thomas S. Kuhn's book, *The Structure of Scientific Revolutions*.¹⁷⁴ In this historical analysis of the development of scientific knowledge, Kuhn found that the science progressed through a succession of paradigm shifts. Communities of scientists developed models (or "paradigms")¹⁷⁵ which the scientific authorities of the time established as orthodoxies. Over time, scientists found "anomalies" (i.e., findings that were not explained by the accepted paradigms), and they developed fixes to work around the problems within the accepted paradigms.¹⁷⁶ Eventually anomalies accumulated to the point where innovative scientists developed new theories to resolve persistent problems that could not be explained adequately by the prevailing contemporary paradigm. Thus, once-new paradigms were discarded in favor of newer and better paradigms.¹⁷⁷ Ironically, the "revolutionaries" who advanced new paradigms sometimes became reactionary enforcers of new scientific orthodoxies, which were overthrown by a later generation of revolutionaries.¹⁷⁸ This analysis counsels against developing narrow, brittle, and static ADR models and suggests the value of broad, flexible, and dynamic models.

For true believers of a given paradigm,¹⁷⁹ it is tempting to deny the existence of the paradigm's anomalies. Candid acknowledgment of problems is not only intellectually honest, but it also helps to promote the paradigm's survival by encouraging fixes to avoid or minimize the problems. Though the accumulation of a large number of fixes may lead to the eventual replacement of a paradigm, the failure to deal directly with anomalies is

¹⁷³ See *supra* note 58 and accompanying text.

¹⁷⁴ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

¹⁷⁵ *Id.* at 175 (defining "paradigm" as "entire constellation[s] of beliefs, values, techniques, and so on shared by the members of a given community" and also as "one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of . . . puzzles of normal science").

¹⁷⁶ See *id.* at 52-65.

¹⁷⁷ See *id.* at 66-135.

¹⁷⁸ See *id.* at 144-59.

¹⁷⁹ Some practitioners identify as "true believers" in mediation or CL. See Lande, *supra* note 29, at 1317-18 n.3.

likely to lead to a more rapid demise. We can already see an accumulation of anomalies in the Collaborative paradigm. The fact that there has been so much resistance to the Collaborative paradigm outside the family context is a major anomaly.¹⁸⁰ Some people have suggested fixes to the problems that Collaborative theory does not seem to solve well. For example, some have suggested: (1) delay in signing the participation agreement until they are confident that the CL process will work,¹⁸¹ (2) provision of special cautions to clients who cannot afford hiring another set of attorneys;¹⁸² (3) use of time limits on disqualification, such as one year; and (4) use of arbitration or private judging options to resolve disputed issues.¹⁸³ Cooperative practice (i.e., dispensing with the disqualification agreement) itself is another attempted fix.¹⁸⁴ If CL is not flexible enough to solve a range of practical problems, any shift to this paradigm may soon be succeeded by a new paradigm that is better able to handle its anomalies. In that situation, Collaborative practice would become a footnote in ADR history as a “failed experiment.”¹⁸⁵

There is no simple formula for the success of ADR innovations. Hostility

¹⁸⁰ See *supra* notes 87–88 and accompanying text; *infra* Part III.C.1.d.

¹⁸¹ Collaborative lawyer David Hoffman has occasionally waited until the second or third meeting with the other side “to make sure that my client and I feel confident that the other party is willing and able to collaborate.” See posting of David A. Hoffman, dhoffman@BostonLawCollaborative.com, to CollabLaw@yahoogroups.com (Oct. 2, 2005) (on file with author) (responding to listserv query about “clients resistance to Collaboration because of lawyer withdrawal” provision). In addition, when it is unclear if parties can succeed in Collaborative Law, he suggests using Cooperative Negotiation Agreements without a disqualification agreement. See Hoffman, *supra* note 32.

¹⁸² See Hoffman, *supra* note 181 (recommending deferring signing CL participation agreement for a few meetings when the “parties’ resources are so limited that they cannot afford a second set of lawyers”). Hoffman argues that “CL attorneys need to warn clients with modest resources in the clearest possible terms of the risks presented by an impasse on a critical issue.” David A. Hoffman, *Collaborative Law: A Practitioner’s Perspective*, DISP. RESOL. MAG., Fall 2005, at 25, 26.

¹⁸³ See TESLER, *supra* note 31, at 61 n.8 (recommending provision in CL participation agreement allowing “limited, carefully controlled use of a third-party decision maker”).

¹⁸⁴ For the definition of Cooperative Law, see *supra* note 62.

¹⁸⁵ Fairman describes the development of CL as following a “predictable path.” Fairman, *supra* note 25, at 78. With the benefit of hindsight, innovation may seem predictable or even inevitable. Of course, many innovations are not widely adopted or are merely fads, i.e., popular innovations that are generally discontinued after a time. See EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 275 (5th ed. 2003). Although CL is now a vibrant movement, it did not “catch on” widely for about a decade and there is no guarantee that it will continue to be vibrant a decade from now.

to the existing legal system is inappropriate and unlikely to be sustainable over an extended time. Leaders of ADR movements should create a careful balance between maintaining the essential values of their innovations and being flexible enough to satisfy needs of leaders of the legal system, practitioners, and the public. Professor Dorothy Della Noce and her colleagues studied mediation programs in Florida and grouped them into three general categories: assimilative, autonomous, and synergistic.¹⁸⁶ Programs that generally used an assimilative approach adapted mediation to the underlying values and norms of the court system by emphasizing case processing, “using practices that imbue mediation with the authority and formality of the courts” and “mapping . . . legal language onto mediation.”¹⁸⁷ On the other end of the continuum, autonomous programs sought to maintain a separate identity from the court by establishing a separate identity for the mediation program, maintaining flexibility in process design, and structuring the mediation process to focus on conflict interaction as opposed to case disposition.¹⁸⁸ Programs using a synergistic approach valued the benefits of a court connection and also honored mediation values of preserving party voice and choice as much as possible within the court system. Synergistic programs balanced their mediation values with the courts’ needs, engaged community members and agencies as stakeholders in the program, and used mediation practices that preserved the integrity of the mediation process.¹⁸⁹ Professor Della Noce found that the assimilative programs gained the benefits of court support but failed to produce the distinctive advantages of mediation.¹⁹⁰ On the other hand, autonomous programs maintained their purity of values, but failed to receive the benefits of collaboration with the courts including a substantial number of cases to mediate.¹⁹¹ The synergistic programs created the best of both worlds by developing productive relationships with the courts and also maintaining their values about dispute resolution.¹⁹² Moreover, synergistic programs developed structural partnerships between the courts, mediation programs, and other elements of the community that can have some intrinsic value in building a stronger

¹⁸⁶ Dorothy J. Della Noce et al., *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11 (2002).

¹⁸⁷ *Id.* at 21–23.

¹⁸⁸ *Id.* at 23–25.

¹⁸⁹ *Id.* at 25–27.

¹⁹⁰ *Id.* at 29–32.

¹⁹¹ *Id.* at 34–35.

¹⁹² Della Noce et al., *supra* note 186, at 32–38.

society.¹⁹³

ADR innovations are likely to fail to fulfill their potential if they do not create a proper balance of connection with and autonomy from the courts. Professor Della Noce and her colleagues provide a useful framework for analyzing ADR systems and their relationships with the courts as well as system stakeholders. In general, a synergistic approach seems optimal and system planners should consider using that approach before trying an assimilative or autonomous approach.

III. APPLICATION OF POLICYMAKING PRINCIPLES TO PROPOSALS FOR NEW ETHICAL RULES FOR NEGOTIATION

This Part uses the principles outlined in the preceding Part to analyze Professor Christopher Fairman's proposal for a new ethical rule for CL lawyers. To highlight key elements of Professor Fairman's proposal, this Part compares it with Professor Scott Peppet's proposal for new ethical rules to enable lawyers to practice more collaboratively. No proposal is perfect or comprehensive, and the primary purpose of this analysis is to illustrate the principles rather than to promote or oppose these particular proposals. Although this Article argues that Professor Peppet's proposal is generally preferable to Professor Fairman's, the following analysis suggests that both proposals have merits and both could be modified to be more consistent with the principles described in the preceding Part. In particular, this Article argues that both proposals would be improved by crafting strategies that rely more heavily on nonregulatory policies to achieve their goals.¹⁹⁴

¹⁹³ See Jaimie C. Kent, *Getting the Best of Both Worlds: Making Partnerships Between Courts and Community ADR Programs Exemplary*, 23 CONFLICT RESOL. Q. 71 (2005) (ADR experts were interviewed to identify factors that lead to synergistic relationships between community mediation programs and courts.). For discussion of courts' efforts to collaborate with other entities to promote justice, see Lande, *How Much Justice Can We Afford?*, *supra* note 93, at 243–47.

¹⁹⁴ In response to this Article, Fairman describes my analysis as follows:

Having fully developed a DSD paradigm, Professor Lande proceeds to compare my Proposed Model Rule 2.2 to his DSD rubric, followed by a comparison of Professor Scott Peppet's Proposed Model Rule 4.1 to DSD and, ultimately, a direct comparison between the two proposed Model Rules. Having changed not just the rules of the game—but the game itself—it is not surprising that my plan may fall short by comparison.

Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 731 (2007). Fairman's statement mischaracterizes this Article, which does not *compare* Fairman's and Peppet's

A. Summary of Fairman's Proposal for New Rule for Collaborative Law

Professor Fairman's article provides an extensive analysis of regulation of CL, reviewing statutes, ethical rules, legal ethics opinions, and efforts at self-governance in the Collaborative movement.¹⁹⁵ Based on this detailed analysis, he concludes that a new ethical rule is needed now to educate CL lawyers about ethical issues in CL.¹⁹⁶ To frame his argument, he cites criteria that Dean Rapoport proposed for determining whether new ethical rules are needed:

Dean Nancy Rapoport has developed a helpful test for determining if new and distinct ethical rules are warranted in a specific area of legal practice. First, the test for new separate rules includes a baseline assessment of whether there is a poor fit with the practice area and the generalist models of ethics rules. This assessment is followed by "second order" questions. These include: (1) the degree to which repeat players interact with novices, (2) the existence of different jurisdictional layers, (3) ease of enactment of a uniform code, and (4) benefits of a single code for the practice area balanced by disadvantages of abandoning uniform state regulation.¹⁹⁷

Applying Rapoport's test,¹⁹⁸ Professor Fairman concludes that a new ethical rule is needed for CL. He writes:

Collaborative law's glass ceiling is legal ethics. Unlike other forms of alternative dispute resolution, collaborative law's growth is hampered by

proposals to a DSD framework, but rather *uses* this framework to analyze both proposals. Although this is not a game, Fairman is correct that this framework is quite different from the one that he and many policymakers and commentators use.

¹⁹⁵ Fairman, *supra* note 25, at 84–116.

¹⁹⁶ *Id.* at 74–77, 116–22 (proposing text of draft rule). He writes that the "shallow pool of advisory opinions . . . reflects the need for a more dramatic rule-based solution." *Id.* at 107.

¹⁹⁷ *Id.* at 76 (citing Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998)).

¹⁹⁸ Fairman briefly discusses the "second order questions," *supra* note 25, at 77, but devotes most of his article to arguing that there is a poor fit between CL and the traditional model of lawyering. This Article stipulates the presence of the first two of Rapoport's "second order" conditions. One could argue about the ease of enactment of a uniform code, though it is not central to the ultimate issue. This Article argues vigorously that there is no great benefit to enacting a uniform code now, and indeed, that premature enactment of a uniform rule could be counterproductive. See *infra* Part III.C.3.

questions of compatibility with rules of professional ethics. Critics, including some collaborative law practitioners, find it difficult to square the principles and practices of collaborative law with the professional rules of ethics concerning everything from zealous advocacy to confidentiality to terminating representation. Hence, the ideals of legal ethics collide with the ideals of collaborative law.¹⁹⁹

He states:

Like mediation, collaborative law is another good candidate for its own, new ethical rules. With predictions of collaborative law jettisoning to the forefront of dispute resolution techniques, many lawyers new to the concept are confronting it. They will need education on the underlying ethical principles of the collaborative process. Indeed, the fundamental paradigm shift from adversarial to collaborative makes this field one of the most appropriate for new ethical guidelines. Purely from an educational perspective, new rules for collaborative law seem warranted.

Applying the Rapoport test to collaborative law leads to the same conclusion. There is an obvious problem of “fit” between the current codes of ethics and collaborative law. Practitioners and academics point to the disconnect between the fundamental premise of adversarial representation embodied in the model codes and rules and the cooperative approach of collaborative law. Just as Dean Rapoport concluded in the bankruptcy context, the adversarial model “completely misses the boat.”²⁰⁰

In addition to arguing that the collaborative and traditional paradigms are generally incompatible, Professor Fairman identifies four specific problems that he believes are problematic for the collaborative model under the ethical rules governing lawyers generally:

First, concerns exist about whether collaborative law is consistent with the duty of loyalty—often labeled as “zealous advocacy.” Second, as with mediation, concerns about the duty of candor and truthfulness to others are present with collaborative law. Third, questions about the compatibility of the disqualification provision with the rules governing termination of representation continue. Finally, fears over potential breaches of the duty of confidentiality also remain. Collaborative law faces challenges with each of these ethical hurdles for a common reason. General rules of ethics governing traditional practice were drafted without collaborative law in

¹⁹⁹ Fairman, *supra* note 25, at 74 (footnotes omitted).

²⁰⁰ *Id.* at 76–77 (footnotes omitted).

mind and are ill-suited to the new collaborative process.²⁰¹

He concludes that: (1) CL lawyers have different conceptions of their roles than traditional lawyers and that CL is incompatible with some interpretations of ethical rules governing loyalty and zealous advocacy;²⁰² (2) the duty of candor in the general model of lawyering, which permits “puffing,” is inconsistent with the duty of full disclosure in the CL model;²⁰³ (3) the CL disqualification agreement would need to be “force-fit” into the general model;²⁰⁴ and (4) CL procedures are “riddled with risks to confidentiality.”²⁰⁵

Analyzing ethical rules and opinions issued by state bar associations, he writes that “they reflect the ongoing struggle collaborative law faces under the current ethical rules.”²⁰⁶ He argues that various ethical opinions merely flag the key issues rather than resolve them,²⁰⁷ are “cryptic” and provide “little concrete analysis,”²⁰⁸ and are only advisory.²⁰⁹ The small body of opinions address a “striking” number of rules with a “notable lack of consensus as to which specific rules are implicated. . . . [T]he limited analysis by state ethics committees fails to yield consensus on even what questions to ask, much less the answer.”²¹⁰

Professor Fairman argues that CL participation agreements and statements of principle issued by CL organizations are inadequate to regulate

²⁰¹ *Id.* at 84.

²⁰² *Id.* at 84–86.

²⁰³ *Id.* at 87–91. Puffing refers to misleading statements in negotiation that are generally acceptable. Rule 4.1(a) of the Model Rules of Professional Conduct prohibits lawyers from knowingly making false statements of material fact to a third party. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2004). However, a comment to the Rule states that “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category” *Id.* at cmt. 2. Such statements are commonly called “puffing.”

²⁰⁴ Fairman, *supra* note 25, at 94 (arguing that “attempts to force-fit the disqualification agreement into the current ethical regime will continue to be unsatisfying”).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 108.

²⁰⁷ *Id.* at 110.

²⁰⁸ *Id.* at 111.

²⁰⁹ *Id.* at 115.

²¹⁰ Fairman, *supra* note 25, at 115.

the ethical issues involved. He says that the participation agreements are silent on some key issues, are sometimes vague and inconsistent with each other, and cannot adequately address the ethical issues inherent in CL.²¹¹ Similarly, he contends that statements of principle issued by CL organizations (such as the widely used “Principles and Guidelines for Collaborative Law”) are inadequate as they “contain a mixture of procedural rules and aspirational ethical goals limited exclusively to family law matters.”²¹² Although some provisions are clear, some are imprecise or “micro-manage” behavior.²¹³ In general, he finds that standards and guidelines issued by CL organizations are “underdeveloped, excessively detailed, or internally confusing” regarding legal ethics.²¹⁴ He cites research indicating that many CL practitioners do not recognize ethical issues and argues that it would be unwise to rely too much on local CL practice groups to police ethical requirements.²¹⁵

He concludes, “[w]ith major ethical questions remaining unanswered, the stage is set for a superior approach to resolve the ethical issues surrounding collaborative law—an amendment to the Model Rules of Professional Conduct.”²¹⁶ He has an extremely broad conception of the scope of problems that are ethical problems or that justify the adoption of new ethical rules for CL lawyers.²¹⁷ Professor Fairman’s proposal is intended to educate

²¹¹ *Id.* at 97.

²¹² *Id.* at 98.

²¹³ *Id.* at 98–99.

²¹⁴ *Id.* at 103.

²¹⁵ *Id.* at 96–97.

²¹⁶ Fairman, *supra* note 25, at 115–16.

²¹⁷ The following three arguments illustrate Fairman’s vast conception of the legitimacy of and need for ABA’s adopting ethical rules to regulate CL lawyers. First, Fairman justifies the need for his proposed ethical rule by noting the fact that the National Conference of Commissioners of Uniform State Laws (NCCUSL) has convened a drafting committee for CL:

[Lande] mentions that NCCUSL is not in the business of drafting Model Rules [of Professional Conduct for lawyers], that is the role of the ABA. He is certainly right on that account. However, the Uniform Mediation Act was a joint effort between the ABA and NCCUSL and its end product was clearly in the realm of ADR ethics. Another joint effort is certainly not foreclosed.

Fairman, *supra* note 194, at 729 n.112. This statement is puzzling for two reasons. First, since Fairman acknowledges that NCCUSL does not draft the Model Rules, it seems inconsistent to say that a joint effort with the ABA to draft such rules is not foreclosed. More generally, he implies that it would be appropriate for the ABA to adopt ethical rules for anything within a vague “realm of ADR ethics.” *Id.* This is implausible.

lawyers²¹⁸ and he argues that the educational function of ethical rules is “sufficient in itself to justify creation of a new rule.”²¹⁹ He proposes the text of a rule including commentary.²²⁰ The proposed rule codifies a combination of general CL practice²²¹ and ethical rules governing lawyers generally.²²² It defines CL, states that CL lawyers represent their own clients, provides that information relating to CL representation is confidential, and requires CL lawyers to be competent.²²³ The changes in the rules require lawyers to: negotiate in good faith using cooperative strategies (and refrain from

Second, he writes:

Professor Lande also takes issue with the notion that questions of ethics surrounding the withdrawal agreement have stunted collaborative law’s growth outside the family law area. Specifically, he contends that while the disqualification agreement is a major barrier to expansion, it is not due to the “ethical aspects” of it. This misunderstands my point: Any issue surrounding withdrawal of counsel involves legal ethics rules. Whether the motivation to eschew the withdrawal agreement is also economic does not change its inherent ethical character.

Id. at 717 n.49 (citation omitted). Thus, Fairman apparently suggests that anything “surrounding” a procedure that has an ethical aspect justifies adoption of legal ethics rules, regardless of whether the ethical aspect causes problems or whether a proposed rule would prevent or solve any problems. Fairman’s statement suggests that ethical rules are appropriate if the causes of a problem are “also economic,” indicating that he might believe that ethical rules are not justified if a problem is caused exclusively by economic factors. In this instance, however, he offers no evidence that the problems are caused by the ethical aspects of the procedure. For further discussion of this issue, see *infra* Part III.C.1.d.

Third, citing an appellate case that focuses exclusively on the enforceability of an arbitration clause in a CL participation agreement, he suggests that ethical rules are needed because of disputes unrelated to the essential features of CL. See Fairman, *supra* note 194, at 718 n.54 (citing *Kiell v. Kiell*, 633 S.E.2d 827 (N.C. App. 2006)). He writes:

While the legal issue presented in this case is independent of collaborative law, the district court must still determine whether to enforce the collaborative law agreement and plainly illustrates that a break-down in the collaborative process can place the participation agreement squarely before the a trial court—exactly what the agreement is designed to prevent.

Id. The fact that some parties in CL do not reach agreement is not persuasive evidence of the need for a new ethical rule. See *infra* Part III.C.1.

²¹⁸ See Fairman, *supra* note 25, at 74–77, 116–22.

²¹⁹ Fairman, *supra* note 194, at 709.

²²⁰ See Fairman, *supra* note 25, at 117–21.

²²¹ See *supra* notes 27–45 and accompanying text.

²²² See *infra* Parts III.C.1.a, III.C.1.b.

²²³ See Fairman, *supra* note 25, at 117–18.

threatening contested court proceedings), make full and voluntary disclosure of all relevant information (and refrain from puffing), and withdraw from representation if the CL process terminates.²²⁴ Although Professor Fairman is primarily concerned about educating CL lawyers, violators of the proposed rule would be subject to professional discipline administered by courts or state bar associations and might also be subject to malpractice liability.²²⁵ He concludes, "I believe it is freedom from choice, not freedom of choice that collaborative law needs."²²⁶

B. Summary of Peppet's Proposal for New Rule for Collaborative Negotiation

Professor Peppet recently proposed revising the Model Rules of Professional Conduct to accomplish goals similar to Professor Fairman's.²²⁷ Professor Peppet's proposed rules would permit—and thus hopefully encourage—lawyers to opt for higher ethical standards governing their dealings with opposing parties.²²⁸ He contends that lawyers who make credible commitments of cooperation to opposing parties can increase the likelihood of reaching agreements that benefit their clients (as well as themselves and opposing parties).²²⁹ He argues that ethical rules are needed when opposing counsel know little about each other so that they can make such credible commitments of cooperation by subjecting themselves to substantial professional discipline if they do not live up to those commitments.²³⁰ His proposal would permit lawyers to choose particular

²²⁴ See *id.* For definition of puffing, see *supra* note 203.

²²⁵ For a discussion of how ethical rules are used to establish the standard of care in legal malpractice cases, see McKee, *supra* note 2.

²²⁶ Fairman, *supra* note 194, at 738 n.153 (citing song lyric by 1980s New Wave band, Devo).

²²⁷ Peppet, *supra* note 28, at 514–38.

²²⁸ See *id.*

²²⁹ *Id.* at 478–79.

²³⁰ *Id.* at 485–86, 494–98. He argues that in many cases merely signing an agreement to be cooperative with an adversary—such as a CL participation agreement—is unlikely to be effective in convincing the adversary of this commitment:

If an adversary knows that signing such an agreement is "cheap" and that the lawyer has little to lose if the client later wants to secretly renege, the agreement is worth very little. Again, this is particularly true in contexts that lack strong reputational markets where reputational or informal sanctions might counteract the desire to cheat.

PRINCIPLES FOR POLICYMAKING ABOUT COLLABORATIVE LAW

elements of the CL model and thus they (and their clients) would not be limited to an all-or-nothing choice of either the full CL model or the existing model of legal representation.

Professor Peppet proposes amendments to Model Rule 4.1 that would enable lawyers to make separate “bundles” of commitments (each with the clients’ written informed consent) including: (a) proposed Rule 4.1(2)—to be truthful, disclose all material information (without the current exceptions for “puffing” etc.), and negotiate in good faith; (b) proposed Rule 4.1(3)—to refuse to assist in negotiation “that works substantial injustice upon another party;” and (c) proposed Rule 4.1(4)(b)—to be bound to withdraw from representation if unable to comply with the obligations under Rules 4.1(2) or 4.1(3).²³¹ Lawyers could terminate these obligations by giving notice, signed by the lawyer and client, to all affected parties.²³² Professor Peppet also proposes an addition to Rule 7.4(e) permitting lawyers or law firms to designate themselves as “Collaborative” or “Problem-Solving” if they “primarily practice[] subject to the provisions of Rule 4.1(2) or 4.1(3).”²³³

Collectively, Professor Peppet’s proposed provisions reflect key elements of the general CL model. His proposal would enable lawyers and clients to commit to the entire set of provisions at the outset of a case, which would yield real advantages in many cases. Professor Peppet’s proposal would also permit unbundling of CL (which is, itself, an example of “unbundled” legal services).²³⁴ Thus lawyers and clients could commit to be

Id. at 496 (footnote omitted).

²³¹ *Id.* at 523–24. The proposal would also amend Rule 1.6 to permit corresponding modification of the lawyers’ obligations of confidentiality. *Id.* at 524.

²³² *Id.* at 523.

²³³ Peppet, *supra* note 28, at 524. Peppet also refers to lawyers designating themselves as “Rule 4.1(2)” or “Rule 4.1(3)” attorneys on a case-by-case basis. *See id.* at 528. The collaborative movement is virtually unanimous that the term “collaborative” should be reserved for agreements involving the disqualification agreement. For example, Pauline Tesler writes, “There is really only one irreducible minimum condition for calling what you do ‘collaborative law’: *you and the counsel for the other party must sign papers disqualifying you from appearing in court on behalf of either of these clients against the other.*” TESLER, *supra* note 31, at 6 (emphasis in original); *see also* Lande, *supra* note 29, at 1324. Given the substantial and increasing recognition of CL as a distinct practice, it would be appropriate to use terms other than “collaborative” in Peppet’s proposed Rule 7.4(e).

²³⁴ The practice of lawyers offering a limited scope of services is referred to as “unbundling” or “discrete task representation.” *See generally* N.C. St. B., Formal Ethics Opinion 10, 2006 WL 980309 (2005) (approving limited scope of representation if the lawyer fully explains it and the client consents); FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000) (manual

truthful and fair in negotiation without committing to withdrawal, thus encompassing Cooperative Law.²³⁵ Similarly, Professor Peppet's proposal would not require a mutual commitment by all sides in a dispute, thus facilitating the practice of "settlement counsel,"²³⁶ in which one party can unilaterally decide to use a lawyer who is solely committed to negotiation.²³⁷ Moreover, lawyers and clients would not need to make commitments about negotiation at the outset of a case as they might prefer to wait until after they have a chance to gauge each others' trustworthiness.²³⁸

Professor Peppet's proposal certainly is not perfect. He identifies various potential problems in getting the proposal adopted and implemented effectively.²³⁹ As compared with Professor Fairman's proposal, however, it seems particularly appealing because of the greater potential impact (by affecting a much wider range of the legal profession and the legal culture generally) and for better following the principles set out above. The following Part focuses primarily on Professor Fairman's proposal to illustrate the principles in Part II and discusses Professor Peppet's proposal for comparison.

published by the ABA Law Practice Management Section); Forrest S. Mosten, *Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 FAM. CT. REV. (Special Issue) 10 (2002).

²³⁵ For definition of Cooperative Law, see *supra* note 62.

²³⁶ This is sometimes called "resolution counsel."

²³⁷ One party in a case may use settlement counsel without other parties doing so, and settlement counsel need not withdraw if the party chooses to proceed in litigation. Indeed, settlement counsel and litigation counsel may work simultaneously on the same case. See generally William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 369–70 (1999); Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A. J. 1221, 1221–24 (1983); James E. McGuire, *Why Litigators Should Use Settlement Counsel*, ALTERNATIVES TO HIGH COST LITIG., June 2000, at 107, 120–23; Lande, *supra* note 29, at 1322–23 n.20.

²³⁸ See Peppet, *supra* note 28, at 528. Parties typically begin a CL process from the outset of a case, though parties sometimes switch from traditional representation to CL in the middle of a case.

²³⁹ *Id.* at 533–38. For discussion of additional problems with Peppet's proposal, see *infra* Part III.C.3.

C. Analysis of Fairman's Argument (Including Comparison with Peppet's Argument)

1. Problematic Assessment of Need for New Ethical Rule

This Part argues that Professor Fairman's article does not persuasively demonstrate the need for a new ethical rule for CL, as contemplated by dispute system design theory.²⁴⁰ His argument is based on the following faulty premises. First, a new specific ethical rule for CL is needed to protect CL users.²⁴¹ Second, CL is generally incompatible with the general model of lawyering.²⁴² Third, CL does not fit very well within current codes of ethics.²⁴³ Fourth, the lack of an ethical rule specifically regulating CL constitutes a "glass ceiling" that hampers the growth of CL.²⁴⁴

By contrast, Professor Peppet's proposal is based on a more persuasive identification of a problem with the current ethical regime. Professor Peppet argues that negotiators who want to be "small c" collaborative²⁴⁵ in negotiations have a problem because they fear that their negotiating partners would secretly take advantage of their honesty:

A negotiator must try to determine the "type" of her counterpart—is the counterpart an honest, collaborative type or a more hard-bargaining, deceptive type? The counterpart, meanwhile, may be sending off misleading signals about his type. He may present himself as a collaborative, honest type in order to mask that he actually plans to deceive for personal gain.²⁴⁶

Professor Peppet cites substantial research, which is consistent with common experience, to show that this situation is a widespread problem.²⁴⁷

²⁴⁰ For discussion of dispute system design, see *supra* Parts II.A, II.B.2.

²⁴¹ See *infra* Part III.C.1.a.

²⁴² See *infra* Part III.C.1.b.

²⁴³ See *infra* Part III.C.1.c.

²⁴⁴ See *infra* Part III.C.1.d.

²⁴⁵ See *supra* note 27 for description of a convention regarding capitalization of "collaborative."

²⁴⁶ Peppet, *supra* note 28, at 482.

²⁴⁷ See *id.* at 483 nn.22–24; Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997) (survey of lawyers finding that 71% of their cases were settled using positional negotiation despite the fact that 61% of the respondents said that interest-based negotiation should be used more often); see also Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the*

This problem is clearly related to the fact that lawyers are authorized to use “puffing,”²⁴⁸ thus misrepresenting some of the most critical facts in negotiation, including the parties’ perceptions, interests, and intentions. His proposal to amend the rules permitting these practices is designed to address this real problem in traditional negotiation.

a. Lack of Demonstrated Harm to Clients Requiring New Ethical Rule

Ethical rules are primarily intended to protect clients from harm that might be caused by their lawyers and to provide legal sanctions when lawyers violate the rules.²⁴⁹ There is no evidence that any CL clients have been harmed by the lack of a special ethical rule for CL. As far as I know, there have been no complaints against CL lawyers to bar associations and no malpractice claims against CL lawyers. Five state ethics committees have issued opinions about CL, which have all been in response to queries about CL practice generally rather than allegations of particular misdeeds.²⁵⁰

Professor Fairman’s article identifies several problems that CL clients have experienced, but they all can be readily addressed under existing ethical rules. He cites Professor Macfarlane’s study of CL practice, noting that some clients have not been given adequate disclosure of waiver of confidentiality²⁵¹ and attorneys’ fees.²⁵² He acknowledges, however, that waiver of confidentiality would be covered under current Model Rule 1.6,²⁵³

Effectiveness of Negotiation Style, 7 HARV. NEGOT. L. REV. 143, 167 (2002) (survey of lawyers in which 54% rated opposing counsel using a problem-solving approach as effective and 4% as ineffective compared with 9% of lawyers who rated an adversarial approach as effective and 53% as ineffective); Lande, *supra* note 29, at 1318–20 n.9.

²⁴⁸ See *supra* note 203 for definition of puffing.

²⁴⁹ Typically, the sanctions involve professional discipline. In addition, in suits alleging professional malpractice, most courts will admit evidence of professional rules as evidence of the standard of care for liability even though “[m]ost preambles contain language specifically disclaiming any intention of undertaking to define standards for civil liability of lawyers.” See McKee, *supra* note 2, § 2.

²⁵⁰ For discussion of the state bar ethics opinions, see *infra* Part III.C.1.c.

²⁵¹ See Fairman, *supra* note 25, at 95.

²⁵² *Id.* at 121–22 (citing research finding that some clients did not realize that their lawyers would charge for discussions between members of the Collaborative team that did not take place during meetings with the clients).

²⁵³ *Id.* at 95. He argues that Rule 1.6 offers a “framework” for handling this issue but argues that it would require lawyers to do “a tremendously thorough job of obtaining informed consent.” *Id.* It is not clear how his proposed rule—which primarily states that

and Rule 1.5 is quite adequate to regulate ethical issues about attorneys' fees.²⁵⁴ He also cites findings that the disqualification agreement caused some clients to fear being stuck in CL²⁵⁵ or losing their CL lawyers' services

"all information arising from and relating to a collaborative representation is confidential"—would improve the situation. *See id.* at 117. The current Model Rules contain a similar provision about the applicability to all sources of information. A comment to Rule 1.6 states, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2004). In response to this Article, he argues that his proposed confidentiality provision "extends the reach to third party experts and imposes a duty on counsel to ensure compliance by both clients and consultants." Fairman, *supra* note 194, at 720–21 n.61. Although it is good practice for lawyers to discuss confidentiality obligations with their clients and the experts they hire, it seems odd, to say the least, to subject lawyers to professional discipline if they fail to ensure the clients' or experts' compliance. His proposed rule would also create confusion as it provides no exceptions to the confidentiality obligation as provided in Rule 1.6(b), so lawyers and regulators would be uncertain whether the exceptions applicable to lawyers generally also apply to CL lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b).

Fairman notes that confidentiality is related to the duty of full disclosure in CL and that clients effectively waive attorney-client privilege in CL as to communications in the presence of the other lawyer or party. *See* Fairman, *supra* note 25, at 94–95. He is right to be concerned about waiver of the attorney-client privilege, which protects against compulsion of lawyers to disclose information conveyed to the attorney by the client, whereas the ethical duty of confidentiality does not protect against compulsion of such testimony. *See* Lande, *supra* note 29, at 1341–42 n.88. However, it is clearly possible to advise clients about waiving attorney-client privilege. The Mid-Missouri Collaborative and Cooperative Law Association's addendum to the CL lawyer retainer agreement states:

Client understands that the Collaborative Law Process requires the Client to disclose all relevant information to the other party and the other party's lawyer, subject to the confidentiality provisions of the Collaborative Law Agreement between the parties. Client understands that this constitutes a waiver of attorney-client privilege regarding such disclosures. Client consents to this waiver.

MID-MISSOURI COLLABORATIVE AND COOPERATIVE LAW ASSOCIATION, ADDENDUM TO LAWYER RETAINER AGREEMENT FOR PARTICIPATION IN COLLABORATIVE LAW PROCESS ¶ 3 (2006), http://www.mmcla.org/collab_retainer.pdf. Lawyers should discuss this with clients to make sure that they understand it.

²⁵⁴ *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003) (regulating attorneys' fees, including requirement that lawyers communicate with client about basis of fees). Fairman acknowledges that his proposed rule does not address disclosures about attorneys' fees. *See* Fairman, *supra* note 25, at 121.

²⁵⁵ Fairman, *supra* note 25, at 91.

because the other party decided to litigate.²⁵⁶ Ethics committees have found that existing rules permit CL lawyers to use the disqualification agreement,²⁵⁷ but Professor Fairman's proposal authorizes it as well,²⁵⁸ so his proposed rule would not solve problems caused by a disqualification agreement. Moreover, existing rules require lawyers to obtain clients' informed consent to use a disqualification agreement,²⁵⁹ thus it is not clear why a new rule is needed to address this concern.

Professor Fairman argues that the CL process requires full disclosure of information by the parties and that existing ethical rules are inadequate to govern this situation because they permit lawyers to engage in puffing.²⁶⁰ Asserting that "lawyers lie," Professor Fairman cites a survey of lawyers finding that 61% of the respondents believe that it is ethically permissible to use puffing in negotiation and that 73% actually did so.²⁶¹ It is not clear, however, how often CL lawyers engage in puffing, if at all. If it is a problem calling for a new ethical rule, Professor Peppet's proposal solves this problem more directly and would be useful to a much larger class of lawyers than Professor Fairman's proposal.²⁶² In addition, states could enact statutes establishing requirements for candor in CL, as Texas has done,²⁶³ and lawyers would be ethically required to comply with those laws.²⁶⁴ Even without a specific statute or ethical rule, CL participation agreements typically include provisions establishing duties of full disclosure by lawyers

²⁵⁶ *Id.* at 93.

²⁵⁷ See *infra* notes 315–20 and accompanying text.

²⁵⁸ See Fairman, *supra* note 25, at 117–18.

²⁵⁹ See *infra* notes 305, 315–20 and accompanying text.

²⁶⁰ Fairman, *supra* note 25, at 87–91. For definition of puffing, see *supra* note 203.

²⁶¹ Fairman, *supra* note 25, at 88 n.96. For discussion of puffing, see *supra* notes 203, 246–48 and accompanying text. Analysis of ethical issues relating to puffing is beyond the scope of this Article. For the purpose of this discussion, this Article assumes that puffing generally is problematic.

²⁶² See *supra* notes 234–38 and accompanying text.

²⁶³ Texas Family Code § 6.603(c)(1) states that "A collaborative law agreement must include provisions for: (1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case . . ." TEX. FAM. CODE ANN. § 6.603(c)(1) (Vernon 2006). In addition to requiring lawyers to communicate truthfully, such statutes would require CL clients to do so as well.

²⁶⁴ A comment to the Model Rules of Professional Conduct states that "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever *lawful* and ethical measures are required to vindicate a client's cause or endeavor." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2004) (emphasis added).

(as well as clients).²⁶⁵ Thus it is not clear that puffing by CL lawyers is a problem and, if so, that Professor Fairman's proposal would be the best way to address it.

Professor Fairman quotes Professor Macfarlane's study which states, "[o]utside a small group of experienced practitioners, the study has found little explicit acknowledgment and recognition of ethical issues among CL lawyers."²⁶⁶ She also found that "[m]ore experienced collaborative attorneys and [CL] groups are becoming increasingly conscious of the range of unfamiliar ethical dilemmas raised by [CL] practice."²⁶⁷ Moreover, the field has developed and practitioners have gained some experience since she collected her data.²⁶⁸ Thus, although the CL field certainly needs to improve its handling of ethical issues, the present and foreseeable future situation is not quite as dire as Professor Fairman suggests. He also cites Professor Macfarlane's statement that "CL lawyers manage the day-to-day and meeting-by-meeting dynamics of their cases within a context of almost unconstrained professional discretion."²⁶⁹ This statement may be accurate to the extent that CL cases, like most legal matters, are conducted "below the radar" of professional monitoring and enforcement unless something goes seriously awry. Regardless of the level of actual enforcement, CL lawyers certainly are subject to a set of ethical constraints on their conduct, as demonstrated below.²⁷⁰

²⁶⁵ For example, the standard participation agreement approved by the Texas Collaborative Law Council states, "The Parties and Lawyers understand and agree that the essential elements of the collaborative process are: . . . Full and complete disclosure of relevant information. . . ." See Texas Collaborative Law Council, Participation Agreement, http://www.collaborativelaw.us/articles/TCLC_Participation_Agreement_With_Addendum.pdf (last visited July 1, 2006).

²⁶⁶ Fairman, *supra* note 25, at 77 (citing Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 208).

²⁶⁷ MACFARLANE, *supra* note 59, at 64.

²⁶⁸ The study was conducted from 2001 to 2004, at an early stage of development of the CL field, and many of the CL lawyers interviewed for her study had "limited practical experience." *Id.* at 13–15, 63–64. Although the pioneer CL practitioners began in the 1990s, the vast majority of the growth occurred since 2000. At the time of the study, little material had been published and CL organizations had done much less work to develop their own ethical codes.

²⁶⁹ Fairman, *supra* note 25, at 77.

²⁷⁰ See *infra* Part III.C.1.c.

b. *Compatibility of Collaborative Law with the General Model of Lawyering*²⁷¹

CL fits in the general model of lawyering better than Professor Fairman contends. He describes the traditional model as operating under “an inherently adversarial duty of zealous advocacy.”²⁷² However, the general model of legal ethics clearly permits lawyers to act collaboratively when it is in their clients’ interests that they do so. According to the Model Rules of Professional Conduct, lawyers have an obligation to “protect and pursue a client’s legitimate interests,”²⁷³ and lawyers do *not* have a duty to take advantage of others or behave badly.²⁷⁴ The traditional model is certainly adversarial in the sense that all parties are expected to act in their self-interest, and their lawyers are required to represent clients’ interests diligently and loyally. In that structural sense, CL is also adversarial because CL lawyers are obligated to represent their clients’ interests.²⁷⁵ Consider the following CL case I recently heard about. A couple had a nasty and

²⁷¹ The analysis in this Part is adapted from Lande, *supra* note 29, at 1331–38.

²⁷² Fairman, *supra* note 25, at 86.

²⁷³ MODEL RULES OF PROF’L CONDUCT R. pmb1. ¶ 9 (2004).

²⁷⁴ See *id.* (lawyers have an obligation to “maintain[] a professional, courteous and civil attitude toward all persons involved in the legal system”). The Preamble also states that, “[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.” *Id.* ¶ 2.

²⁷⁵ Although there are some views in the CL community inconsistent with traditional notions of lawyers’ duties to represent their clients, these seem to represent a minority view. See Lande, *supra* note 29, at 1331–38. For example, in a recent survey of CL lawyers, 84.1% of respondents disagreed with the statement that CL lawyers are “more like neutrals than like counsel for individual clients.” See William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 380 (2004). Although this survey suggests that there is a relatively small minority of CL lawyers who believe that they function as neutrals, the ethical opinions that have addressed this issue are completely clear that the ethical rules require them to function as advocates. See *infra* note 311 and accompanying text. In response to this Article, Fairman writes, “[i]t is interesting that on this ethical topic where over 15% of collaborative lawyers disagree with Lande, he does not advocate experimentation, percolation, variety, choice, or systems design; instead he resolves the conflict by fiat.” Fairman, *supra* note 194, at 722. In fact, this Article argues that the existing rules and opinions already address this issue appropriately, thus avoiding the need for a new rule to clarify the situation. Fairman’s proposal restates the view that CL lawyers represent only their clients. It states, “[w]hile all collaborative lawyers engaged in resolving a dispute share a common commitment to the collaborative law process, a collaborative lawyer represents the client who has retained the collaborative lawyer’s services.” Fairman, *supra* note 25, at 117.

escalating conflict that resulted in a physical fight. One CL lawyer advised her client to take photos of her bruises in case they were needed for litigation. The person describing the case asked if that lawyer was being “truly collaborative.” The case presented a serious risk that the CL process would terminate and that litigation might be used. It is inconceivable that the ABA would approve an ethical rule authorizing lawyers to allow foreseeable risks of litigation to go unheeded. Although CL lawyers themselves would not represent CL clients in litigation, the CL lawyers’ role must include an adversarial element when needed to protect the clients’ interests.²⁷⁶ In this case, CL lawyers had a duty to take actions needed to protect the client’s interests if the case would be litigated.²⁷⁷

The term “adversarial” is also used to mean use of strongly partisan tactics to maximize one’s advantage, typically harming others’ interests in a presumed zero-sum situation.²⁷⁸ Ethical rules do not require lawyers to be adversarial in this sense. This meaning is often associated with a culture of lawyers’ zealous advocacy, reflected by Canon 7 of the Model Code of Professional Responsibility, which states that a “lawyer should represent a client zealously within the bounds of the law.”²⁷⁹ The ABA adopted the Model Code in 1969, but it has been superseded by the Model Rules of Professional Conduct, which the ABA first adopted in 1983 and most recently revised in 2003.²⁸⁰ The Model Rules refer to the concept of zealous advocacy only in the Preamble and comments. The Preamble to the Model Rules states that the basic principles underlying the Rules “include the lawyer’s obligation zealously to protect and pursue a client’s legitimate

²⁷⁶ See *supra* notes 273, 275 and accompanying text. A comment to the Model Rules of Professional Conduct states, “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2003).

²⁷⁷ Some CL practitioners would argue that the lawyer was not being collaborative because she advised her client to prepare for litigation and/or because she failed to inform the other side that she advised her client to take the photographs. In my view, as long as the CL lawyer takes appropriate action to protect the client’s interests, in this case by instructing the client to preserve evidence, the lawyer should comply with the CL participation agreement. The lawyer can do this by informing the other side—if it would not harm the client’s interests to do so—and trying to protect the client’s interests without litigation if consistent with the client’s interests. If the lawyer determines that it is not possible to do so, she should terminate the CL process.

²⁷⁸ See MNOOKIN ET AL., *supra* note 44, at 17–27.

²⁷⁹ MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1969).

²⁸⁰ MODEL RULES OF PROF’L CONDUCT (2003).

interests”²⁸¹ and that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”²⁸² A comment to Rule 1.3 states that a lawyer must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”²⁸³ Because of such provisions and the legal culture surrounding them, some lawyers believe that a duty of zealous advocacy requires lawyers to take every possible action to benefit their clients that is not prohibited by law.²⁸⁴

That is not, however, an accurate reading of the requirements of the Model Rules, which do not require lawyers to be adversarial in the sense of being extremely partisan. A comment to Rule 1.3 states that a “lawyer is not bound . . . to press for every advantage that might be realized for a client.”²⁸⁵ Rather than requiring lawyers to take extreme positions, the duty of diligence under the Model Rules requires lawyers to overcome opposition, personal inconvenience, workload pressures, and procrastination to advance clients’ interests and complete the tasks involved in the representation.²⁸⁶ Moreover, under Rule 1.2(a), lawyers must consult clients about the means of pursuing clients’ objectives, which could involve clients’ preferences about the degree of the lawyers’ zeal.²⁸⁷ Some clients may have a strong and legitimate objective to minimize conflict and, to achieve this objective, they may want their lawyers to avoid acting in a harsh partisan manner. It is inconceivable that the Model Rules would force lawyers to use a ruthless approach in these situations. Professor Luban argues that “it is extremely doubtful that a lawyer who represented a client diligently and competently would be disciplined for failure to go the extra mile in hyperzeal.”²⁸⁸ He explains that, in practice, lawyers are expected to “satisfice”—produce a “good enough” result—rather

²⁸¹ *Id.* ¶ 9.

²⁸² *Id.* at pmb1. ¶ 2.

²⁸³ *Id.* at R. 1.3 cmt. 1. For further discussion, see Lande, *supra* note 29, at 1332 n.54.

²⁸⁴ See Lande, *supra* note 29, at 1332 n.55.

²⁸⁵ MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2003). The American Academy of Matrimonial Lawyers published *Bounds of Advocacy*, an ethical guide supplementing the Model Rules of Professional Conduct and Model Code of Professional Responsibility. The document argues that public and professional opinion is shifting away from a model of zealous advocacy in which the lawyer’s only job is to win and toward a counseling and problem-solving model referred to as “constructive advocacy.” AM. ACAD. OF MATRIMONIAL LAW., *BOUNDS OF ADVOCACY* (2000) http://www.aaml.org/files/public/Bounds_of_Advocacy.htm.

²⁸⁶ MODEL RULES OF PROF’L CONDUCT R. 1.3 cmts. 1–4 (2003).

²⁸⁷ See *id.* at R. 1.2(a).

²⁸⁸ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 397 (1988).

than to produce the maximum possible result.²⁸⁹ He argues that “if a lawyer obtains a satisfactory outcome for a client, it is hard to imagine the lawyer being disciplined because, with a lot more hustle and ruthlessness, she could have wrung out a few dollars more.”²⁹⁰ As a practical matter, many lawyers—probably most—normally act reasonably and cooperatively,²⁹¹ and no one suggests that this is unethical. Thus it is simply inaccurate, both theoretically and empirically, to say that the general regime of legal ethics requires lawyers to be adversarial in the sense of taking extremely partisan positions.

In addition, the Model Rules do not require lawyers to act in an adversarial manner. A comment to Rule 1.3 states that a “lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”²⁹² The Preamble reads, “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”²⁹³ It further states that the “principles [underlying the Model Rules]

²⁸⁹ David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1012 n.32 (1990).

²⁹⁰ *Id.* For a thoughtful analysis of “zealous advocacy,” see JULIE MACFARLANE, *THE NEW LAWYER* ch. 5 (forthcoming 2007).

²⁹¹ Contrary to Fairman’s description of family law practice as being “hyper-adversarial,” see Fairman, *supra* note 25, at 78, researchers find that in many contexts—especially divorce practice—lawyers often strive to be considered “reasonable.” See LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK* 48–56, 87–109 (2001) (finding a “norm of the reasonable lawyer” in the general community of divorce law practice); HUBERT J. O’GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 132–43 (1963) (finding that almost two-thirds of matrimonial lawyers define their roles as counselors who try to shape clients’ expectations and achieve reasonable results through negotiation); AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–58 (1995) (describing lawyers’ strategies to persuade clients to accept what is legally possible in negotiations); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC’Y REV. 585, 593, 601 (1987) (finding that divorce lawyers often press clients to accept settlements that the lawyers believe are reasonable). Although the empirical research finds that some lawyers do act unreasonably, this is not the norm for family lawyers. See, e.g., MATHER ET AL., *supra* at 48–51, 113–14, 121–25; SARAT & FELSTINER, *supra* at 108; Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 616 (2006) (categorizing more than sixty percent of lawyers negotiating family law cases as using a problem-solving approach).

²⁹² MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2004).

²⁹³ *Id.* at pmbl. ¶ 5.

include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, *while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.*"²⁹⁴

This analysis shows that neither the traditional model nor the CL model is so narrow as to preclude a substantial area of overlap between them. Professor Fairman notes that there is a scholarly consensus that lawyers need not be zealous advocates who always must take extreme positions.²⁹⁵ Citing Professor Macfarlane's research, finding that some CL lawyers experience role tension between traditional and CL advocacy, he argues that a new ethical rule for CL lawyers would "benefit those conflicted by role tension."²⁹⁶ This is an unconvincing empirical claim. Adversarial and problem-solving orientations are probably elements of lawyers' identities that are deeply imbedded. It is hard to believe that simply promulgating a new ethical rule would have much effect on fundamental aspects of professional roles and identities.

c. Compatibility of Collaborative Law with Existing Ethical Rules

Bar association ethics committees or officials in five states—Kentucky,²⁹⁷ Minnesota,²⁹⁸ New Jersey,²⁹⁹ North Carolina,³⁰⁰ and Pennsylvania³⁰¹—have considered the CL model, and all of them have found that the general model is not inconsistent with ethical rules for lawyers.³⁰² All of these opinions responded to questions about the model generally and

²⁹⁴ *Id.* ¶ 9 (emphasis added).

²⁹⁵ Fairman, *supra* note 194, at 715.

²⁹⁶ *Id.*

²⁹⁷ Ky. Bar Ass'n Ethics Comm., Op. E-425, 3 (2005), available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf.

²⁹⁸ Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center, to Laurie Savran, Collaborative Law Institute (Mar. 12, 1997) (on file with author) (advisory opinion regarding CL).

²⁹⁹ N.J. Ethics Op. 699, 14 N.J.L. 2474, 182 N.J.L.J. 1055, 2005 WL 3890576, *5 (2005).

³⁰⁰ N.C. St. Bar, Formal Ethics Op. 1, 2002 WL 2029469, *2 (2002).

³⁰¹ Pa. Bar Ass'n Comm. Leg. Ethics & Prof'l Resp., Informal Op. 2004-24, 2004 WL 2758094, *3-5 (2004).

³⁰² None of these opinions have considered problems presented as actual cases. Rather, all the opinions provide general theoretical analysis, identifying particular rules that practitioners should take care to follow.

PRINCIPLES FOR POLICYMAKING ABOUT COLLABORATIVE LAW

prompted the opinion-writers to canvass rules governing a wide range of aspects of lawyer-client relationships. These opinions addressed lawyers' duties regarding competence, scope of representation, diligent advocacy in representing clients' interests, clients' right to settle, conflicts of interest, confidentiality, candor in negotiations, clients' waiver of liability, lawyers' withdrawal from representation, and advertising. Although these opinions do not apply every single rule of professional conduct, they cover a wide range of the most important rules.

For the most part, the opinions do not require any modification or limitation of CL practice to be consistent with the general ethical rules governing lawyers. For example, the Kentucky opinion specifically rejects a suggestion that CL violates a supposed (but outdated) duty of zealous advocacy.³⁰³

The most common theme in these ethics opinions is that clients must give informed consent,³⁰⁴ which is a fundamental principle of legal ethics

³⁰³ Ky. Bar Ass'n Ethics Comm., Op. E-425, *supra* note 297, at 4–5.

³⁰⁴ For example, the Kentucky opinion states that the Kentucky ethical rules “require the lawyer to fully explain the collaborative law process so that the client can make an informed decision about the representation.” *Id.* at 3. The opinion elaborates as follows:

The kind of information and explanation that is essential to informed decision making includes the differences between the collaborative process and the adversarial process, the advantages and risks of each, reasonably available alternatives and the consequences should the collaborative process fail to produce a settlement agreement. Although the collaborative law agreement may touch on these matters, it is unlikely that, standing alone, it is sufficient to meet the requirements of the rules relating to consultation and informed decision making. The agreement may serve as a starting point, but it should be amplified by a fuller explanation and an opportunity for the client to ask questions and discuss the matter. Those conversations must be tailored to the specific needs of the client and the circumstances of the particular representation. The Committee recommends that before having the client sign the collaborative agreement, the lawyer confirm in writing the lawyer's explanation of the collaborative process and the client's consent to its use.

Id. at 4. The New Jersey opinion is similar, stating that the CL lawyer must “disclose the potential risks and consequences of failure of the collaborative law process to the client, and the alternatives provided by other dispute resolution mechanisms such as traditional litigation with its risks and consequences, and thereby receive informed consent.” N.J. Ethics Op. 699, *supra* note 299, at 5.

To highlight the clients' attention to the risks of CL, the Mid-Missouri Collaborative and Cooperative Law Association includes a paragraph of the participation agreement in bold, which the clients separately initial. See Mid-Missouri Collaborative and Cooperative Law Association, Participation Agreement in Collaborative Law Process ¶

generally³⁰⁵ as well as CL doctrine.³⁰⁶ Some of the opinions refer to specific

II.D, http://www.mmcccla.org/collab_partic.pdf (last visited June 29, 2006). In addition, the Association uses an addendum to the lawyer-client retainer agreement which states, "Client understands that Client may incur additional expense if the Collaborative Law Process terminates without a settlement and Client needs to hire a new lawyer." Mid-Missouri Collaborative and Cooperative Law Association, Addendum to Lawyer Retainer Agreement for Participation in Collaborative Law Process ¶ 4, http://www.mmcccla.org/collab_retainer.pdf (last visited Jan. 30, 2007).

³⁰⁵ Rule 1.0(e) of the Model Rules of Professional Conduct defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2004). At least ten rules include provisions requiring clients' informed consent. *See id.* R. 1.2, 1.4, 1.6, 1.7, 1.8, 1.9, 1.11, 1.12, 1.18, 2.3.

³⁰⁶ *See, e.g.,* TESLER, *supra* note 31, at 20 ("We [CL] family lawyers need to hold ourselves to rigorous standards of informed consent when we advise clients about the dispute resolution options available to them . . ."). Although CL doctrine generally requires informed consent, some CL lawyers have not provided it adequately in practice. In Macfarlane's study, she found that some CL lawyers are "so keen to get their first [CL] experience" that they do not make their own assessments of appropriateness. *See* MACFARLANE, *supra* note 59, at 65. Such lawyers presumably provide little or no education to clients about risks and alternatives that would be needed for clients to provide informed consent. In addition, Macfarlane found that although CL lawyers typically provide information about various elements of the process, they often use such abstract language that some clients complained that "the process [was] not proceeding as they had expected." *Id.* at 64. She summarizes clients' complaints about lack of informed consent to various aspects of the CL process:

Such complaints cover a broad range of process issues, including disclosure requirements (such as access to private discussions with one's lawyer and lawyer-client privilege); the pace at which the negotiations are proceeding; compliance (that is, the limits on overseeing interim agreements or undertakings given in the four-ways); and the calculation of fees.

Id. at 64–65.

Statements by CL practitioners promoting CL vary in the way that they model good informed consent. For example, one practice manual carefully identifies advantages and disadvantages of CL. *See* David A. Hoffman, Rita S. Pollak & Eileen M. Shaevel, *Collaborative Family Law*, in MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL (2003); *see also* TESLER, *supra* note 31, at 94–95 (describing factors affecting suitability for CL). By contrast, the International Academy of Collaborative Professionals' website identifies advantages but no disadvantages of CL, and its section "Is [collaborative practice] for you?" includes no cautions about contraindications. *See* International Academy of Collaborative Professionals, About Collaborative Practice: Is it for You?, <http://www.collabgroup.com/t2.asp?T=IsItForYou> (last visited Jan. 30, 2007). In a recent appearance on the nationally televised Today Show, CL lawyer Neil Kozek said that

matters that the lawyers must inform CL clients, including provisions in CL participation agreements that prohibit use of formal discovery processes and court hearings³⁰⁷ or require (or preclude) disclosure of certain facts such as adultery.³⁰⁸ The North Carolina opinion states that a lawyer may represent a spouse in a CL case where the other spouse is represented by a member of a local practice group, “provided both lawyers determine that their professional judgment on behalf of their respective clients will not be impaired by their relationship to the other lawyer through the [CL] Organization, and both clients consent to the representation after consultation.”³⁰⁹ In addition to requiring that CL clients give informed consent to *using* a CL process, the Pennsylvania opinion focuses on informed decisionmaking about the substantive decisions *within* the CL process. The author of that opinion states, “I think you should do whatever you can to ensure that the client understands that it is the client’s decision whether to settle.”³¹⁰ In sum, if CL lawyers do not provide informed consent, the current ethical rules, as reflected by these opinions, should be more than adequate to address violations of these requirements.

The few limits or cautions in the ethical opinions are modest, reasonable, and generally consistent with CL doctrine. The Pennsylvania opinion, for example, holds that although CL lawyers may negotiate cooperatively with the other lawyer and client, each CL lawyer must identify his or her client solely as the party being represented. The CL lawyer does not represent the family and is not the “lawyer for the situation.”³¹¹

there are “no real risks” in CL. See New York Collaborative Law Group, Today Show Clip, http://www.collaborativelawny.com/today_show.php (last visited Jan. 30, 2007).

³⁰⁷ See Letter from Patrick Burns, *supra* note 298, at 1–2.

³⁰⁸ See N.C. St. Bar, Formal Ethics Op. 1, *supra* note 300, at 2.

³⁰⁹ *Id.* at 1. See also Pa. Bar Ass’n Comm., Informal Op. 2004-24, *supra* note 301, at 9–10 (reaching similar conclusion).

³¹⁰ Pa. Bar Ass’n Comm., Informal Op. 2004-24, *supra* note 301, at 13.

³¹¹ *Id.* at 3–5; see also Ky. Bar Ass’n Ethics Comm., Op. E-425, *supra* note 297, at 3 (opinion stating that “the lawyer has a duty to represent his or her client competently and to exercise independent professional judgment and give candid advice”); Letter from Patrick Burns, *supra* note 298, at 2 (“Great care must be taken to clarify the nature of the relationship between the attorney and the opposing party so that there is no misunderstanding. It must be made very clear that the attorney does not represent the opposing party and cannot provide that person with legal advice.”).

Two CL practitioners report that “[u]sually, [clients] share the dispute resolution costs equally from the community estate, regardless of which lawyer does the bulk of the work.” Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 52 (2004). It is not clear whether this arrangement is consistent with ethical rules in that the lawyers are not paid solely by their respective clients or by

The Kentucky opinion states that a CL lawyer has a “heightened obligation to communicate with the client regarding the representation and the special implications of collaborative law process.”³¹² It states that a lawyer “cannot advise a client to use the collaborative process without assessing whether it is truly in the client’s best interest.”³¹³ The New Jersey opinion notes the distinctive disqualification agreement in CL and that “in some sense the client’s continuing relationship with the lawyer is at the discretion of the opposing spouse. This could conceivably place a considerable hardship upon a client, who would then be required to retain new counsel to take up the case from scratch.”³¹⁴ Applying the rule permitting “reasonable” limitations on the scope of representation, the opinion states that this is a:

[D]etermination that must be made in the first instance by the lawyer, exercising sound professional judgment in assessing the needs of the client. If, after the exercise of that judgment, the lawyer believes that a client’s interests are likely to be well-served by participation in the collaborative law process, then this limitation would be reasonable and thus consistent with RPC 1.2(c).³¹⁵

Noting the “harsh outcome in the event of such failure” of the CL process, the opinion provides the following guidance:

[W]e believe that such representation and putative withdrawal is not “reasonable” if the lawyer, based on her knowledge and experience and after being fully informed about the existing relationship between the parties, believes that there is a significant possibility that an impasse will result or the collaborative process otherwise will fail.³¹⁶

court order. If this arrangement is inconsistent with ethical rules, there are processes for correcting the problem, including use of alternative fee agreements.

³¹² Ky. Bar Ass’n Ethics Comm., Op. E-425, *supra* note 297, at 3.

³¹³ *Id.*

³¹⁴ N.J. Ethics Op. 699, *supra* note 299, at 3.

³¹⁵ *Id.* at 4.

³¹⁶ *Id.* The opinion elaborates this point as follows:

[T]here are also some disputes that may not be amenable to resolution through the collaborative process, such as where the relationship of the divorcing parties is so irretrievably beyond repair that cooperative dialogue between them—a prerequisite to the negotiations that are at the heart of collaborative law—is impossible. Where such circumstances are apparent at the outset of the representation, it is the duty of the lawyer either to decline the representation completely or to engage in it in the

Similarly, the Pennsylvania opinion requires CL lawyers to assess the appropriateness of CL for particular clients. It states that a CL lawyer “must consider each client’s situation (especially those who are victims of domestic violence) when deciding whether a Rule 1.2(c) limitation on the scope of representation is reasonable and whether you can, indeed, provide competent representation to a client under the limited scope of representation.”³¹⁷ In calling for a case-specific analysis, the opinion indicates that some of the relevant factors may include the individual parties’ capabilities, attitudes about professional services, and preferences about risk.³¹⁸

Only one opinion concluded that there was any question whether the disqualification agreement is inconsistent with the ethical rules. After detailed analysis, the author of the Pennsylvania opinion stated, “It is not completely clear to me whether all courts would agree that Rule 1.16(b)(4) supports withdrawal in the CL context.”³¹⁹ Nonetheless, the opinion advised CL lawyers to comply with the rules governing withdrawal and memorialize the lawyers’ decisions when a CL case is terminated before the divorce is completed.³²⁰ The analysis of CL in the five ethics opinions shows that the CL model can fit quite well within the existing ethical rules.³²¹

traditional manner outside the collaborative law process and without the requirement of withdrawal in the event of adversarial proceedings.

Id.

Given CL lawyers’ duty under Rule 1.0(e) to obtain informed consent after “explanation about the material risks of and reasonably available alternatives to the proposed course of conduct,” in my view, it is not appropriate to preclude clients from using a CL process even if there is “substantial” risk that the parties will not reach agreement in the process. *See* MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2004). For example, some might consider that a 33% chance of termination without agreement to be a “substantial” risk, but clients should have the option of making an informed choice to use a CL process in that situation. It is not clear that ethics committees need to pre-designate any threshold of risk that would make it “unreasonable” to use CL. If an ethics committee believes that such a threshold is necessary or appropriate, it should be a much higher level of risk.

³¹⁷ Pa. Bar Ass’n Comm., Informal Op. 2004-24, *supra* note 301, at 7. Macfarlane found that some CL lawyers did not screen cases for appropriateness for CL (including but not limited to issues related to allegations of domestic abuse) or did only perfunctory assessments. MACFARLANE, *supra* note 59, at 65–68.

³¹⁸ Pa. Bar Ass’n Comm., Informal Op. 2004-24, *supra* note 301, at 7.

³¹⁹ *Id.* at 12.

³²⁰ *Id.*

³²¹ Fairman correctly notes that I now have greater confidence in the compatibility of ethical codes to collaborative law than when I published articles in 2003 and 2005. *See* Fairman, *supra* note 194, at 714 n.33. When I published the first article, I knew of only

Professor Fairman argues that the body of existing ethics opinions is problematic as various opinions are advisory, cryptic, and sometimes flag issues rather than resolve them and there is no consensus about which rules are implicated.³²² Scholars make similar criticisms about some court opinions, which is quite common in an incremental common law process of building doctrine over time. Even where there are conflicting court opinions, the typical remedy is to develop future case law to resolve the conflicts rather than to enact new statutes. In the CL context, there are no conflicting rulings and it is premature to adopt a new ethical rule.

one ethical opinion on the subject, which provides little analysis and thus is almost entirely conclusory. See Lande, *supra* note 29, at 1329 n.46. By the time I wrote the 2005 article, I knew of only two ethics opinions. See John Lande, *The Promise and Perils of Collaborative Law*, DISP. RESOL. MAG., Fall 2005, at 29, 30. As described in this Part, I now know of five ethics opinions, including several that provide substantial analysis. This larger body of opinions is generally quite consistent with each other, which provides much greater confidence about how the ethical rules will be applied to CL. Fairman mischaracterizes my different statements as reflecting an “about-face” and “reversal.” Fairman, *supra* note 194, at 718. He writes:

Professor Lande who concluded himself in 2003 “that the traditional rules of legal ethics do not clearly answer questions about the propriety of disqualification agreements.” In 2005, Professor Lande declared the “CL participation agreements probably violate ethics rules if they authorize lawyers to withdraw if clients do not follow the lawyers’ advice.” It is unclear what intervening circumstances have led Professor Lande to a different conclusion today.

Id. Fairman confuses the difference between the two statements. My 2003 statement refers to a standard CL disqualification agreement, which provides for lawyer disqualification if a party decides to litigate. See *supra* note 31 and accompanying text. My 2005 statement refers to disqualification if a client fails to follow the lawyer’s advice, a circumstance which is radically different in character and ethical consequences. The 2005 article cites the analysis in the 2003 article citing extensive authority prohibiting lawyers from using retainer agreements authorizing withdrawal if clients do not follow their advice. See Lande, *supra* note 29, at 1347–49 (my 2003 article); Lande *supra*, at 30–31 (my 2005 article).

Fairman sees no trend toward state ethics committees generating consensus over time. Fairman, *supra* note 194, at 724. I believe that the ethics opinions to date have already achieved remarkable consensus, as described in this Part. Although some of the opinions certainly could provide more guidance, as Fairman argues, the fact remains that all five opinions accepted the legitimacy of CL practice—or, at least, did not find it inconsistent with current ethical rules. A five-to-nothing record seems like consensus to me. The fact that Fairman does not see a consensus does not mean that it does not exist. Indeed, even if one or two new opinions would conflict with the existing body of ethical opinions, it would still represent a strong trend supporting use of CL. Thus I reach the opposite conclusion from Fairman.

³²² See *supra* notes 206–10 and accompanying text.

d. *Mistaken Claim that Lack of New Ethical Rule Hampers Growth of Collaborative Law*

Professor Fairman argues that legal ethics rules act as a “glass ceiling” that hampers the growth of the CL field,³²³ but there is no evidence that the current ethical framework has had any such effect. Professor Fairman argues that “[w]ith its meteoric ascension, in just fifteen years[,] collaborative law has gone from an idea in the mind of a family law practitioner, burned out by the bitterness of his practice, to a virtual ADR movement with thousands of practitioners stretching across North America.”³²⁴ He provides the following account of its success:

One indication of collaborative law’s success is unquestioned: it is rapidly spreading. There are currently more than 4,500 lawyers trained in collaborative law. Eighty-seven distinct collaborative law practice groups exist. Collaborative law is practiced in at least 35 states. It flourishes in certain jurisdictions including Minnesota, Ohio, Connecticut, Texas, Georgia, and the Canadian provinces. Even cursory internet searches return a bevy of collaborative law websites.³²⁵

This does not sound like a movement whose growth has been seriously hampered. Of course one could argue that the movement would have been even greater but for restraints resulting from ethical rules. Indeed, Professor Fairman notes that CL is limited almost exclusively to family law and suggests that CL might not be used in other cases because of the ethical

³²³ Fairman, *supra* note 25, at 74.

³²⁴ *Id.* at 73; *see also id.* at 103 n.195 (“The rise of collaborative family law in Texas is truly meteoric.”).

³²⁵ *Id.* at 83 (footnotes omitted). Although the use of CL has grown dramatically since 1990, one should not exaggerate its potential. CL is most relevant for the population of divorce cases in which both sides have lawyers. A study of sixteen divorce courts found that both parties were represented by lawyers in an average of 28% of cases and that this percentage ranged from 20% to 47% in the different courts. *See* John A. Goerd, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation*, in 16 URBAN JURISDICTIONS 48 (1992). Some CL models include routine use of individual coaches plus jointly retained child development and financial specialists. In communities using that model, CL is limited to clients willing and able to hire the full range of professionals. One compilation of data from 145 CL cases found that 66% of couples using CL had combined incomes of \$100,000 or more. *See* Cox & Matlock, *supra* note 311, at 52 n.15 (noting that the “majority of clients are still relatively affluent”); *see also* Lande, *supra* note 29, at 1324–25.

controversy over the disqualification agreement.³²⁶ Although the disqualification agreement probably is a major obstacle to such expansion,³²⁷ it is extremely unlikely that the ethical aspects of the disqualification agreement are the source of the problem. If the ethical issues were the cause of the problem, one would expect that lawyers would rarely use CL in family law cases unless CL family lawyers are especially indifferent to ethical issues. Moreover, one would expect that the ethics opinions legitimizing the use of CL³²⁸ would reassure lawyers worried about ethical issues.

The problem with the disqualification agreement in nonfamily cases is that the structure of the cases and legal practice—rather than the ethical rules—generally make disqualification extremely unattractive both to lawyers and clients.³²⁹ If the ABA would adopt a rule unequivocally endorsing the ethical legitimacy of the disqualification agreement, it would still be highly unlikely that many lawyers or clients in nonfamily cases would use CL. In general, lawyers and clients who have actual or potential ongoing relationships with each other are understandably wary about sacrificing those relationships if they do not settle a given case. Using CL, with its disqualification agreement, is especially problematic for them because it puts the future of their relationship in the hands of an opposing party. It is not surprising that both lawyers and clients generally would have little appetite for ending the lawyers' representation in a case after investing a substantial amount of time and effort into it. If a nonfamily CL case terminates without settlement, plaintiffs' lawyers paid on contingency would have a problem collecting fees, and defense lawyers would watch a potentially lucrative case go to a competing lawyer or law firm. Moreover, clients would have to invest more time and money in educating new lawyers about the case. Although this is also true in family cases, the consequences of disqualification generally are much greater in nonfamily cases because of the generally larger financial stakes. In particular, civil litigators are likely to have a smaller number of large cases, as compared with family lawyers, so the loss would be much greater. Not surprisingly, the lawyers and clients in nonfamily cases often

³²⁶ Fairman, *supra* note 25, at 83

³²⁷ See Lande, *supra* note 29, at 1329 (“[T]he disqualification agreement is a major barrier to acceptance by major businesses and law firms.”). Accord Hoffman, *supra* note 33 (describing his experience with clients in nonfamily cases who “generally do not see the advantage of the disqualification provision”); Peppet, *supra* note 28, at 490–92 (identifying multiple reasons why lawyers and clients in nonfamily cases would find that the disqualification agreement would not satisfy their interests).

³²⁸ See *supra* Part III.C.1.c.

³²⁹ See *supra* note 327 and accompanying text.

value their relationships more than in family cases.³³⁰ Given the greater risks, parties and lawyers would need greater trust that the opposing side would not abuse the process. Family lawyers tend to practice in small local professional communities and if CL lawyers behave uncollaboratively, they face greater risks to their reputations and potential for future cases.³³¹ In nonfamily cases, the lawyers have much less expectation of repeat interactions with the other lawyers in a case, thus there is greater temptation to take advantage and less security in the process.³³² Therefore the practical and business aspects of the disqualification agreement, rather than the ethical issues, function as a barrier to use of CL in nonfamily cases.

2. Focus on Promoting a Single Process Rather than Improving the System to Meet Needs of Disputants and System Stakeholders

Professor Fairman's proposal focuses specifically on promoting CL practice rather than dispute resolution options more generally. This is not unusual or necessarily problematic. Indeed, it is often wise to focus specifically on a particular issue and analyze it in depth. Improving individual elements in a system obviously can be helpful for the entire system. Thus there is nothing necessarily wrong with Professor Fairman's specific focus on CL. Because of his particular focus, however, his arguments reflect a flawed approach to policymaking and a missed opportunity to have greater impact.

Professor Fairman's "glass ceiling" argument (that ethical rules hamper the growth of CL)³³³ reflects a problematic assumption at odds with dispute system design theory. This argument assumes that expansion of CL per se should be the appropriate policy goal.³³⁴ ADR processes are means to an

³³⁰ *Id.*

³³¹ As a practical matter, expectations of collaboration are enforced by social norms and the market. If a CL lawyer gets a reputation for being an uncollaborative "shark," other lawyers in that community are less likely to refer cases to the lawyer or handle CL cases with him or her.

³³² For a comparison of dynamics in commercial and family law practice, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation And Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 534-50 (1994).

³³³ Fairman, *supra* note 25, at 74.

³³⁴ Fairman challenges my argument that he is promoting a single ADR process and he responds by charging that this is actually what I am doing. Citing my piece entitled, *Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law*, he writes, "[i]f anyone appears to

end—satisfaction of important interests of disputants and other stakeholders—and promotion of these processes should not be the goal in itself. If lawyers and clients are not choosing to use CL, dispute resolution professionals should consider why they are making these decisions and how to craft ADR processes that would satisfy their perceived interests.³³⁵ By contrast, there is evidence that a substantial set of lawyers aspire to the goal of Professor Peppet's proposal, i.e., to increase their use of interest-based negotiation, which is a much more generic process than CL.

The limited potential impact of Professor Fairman's proposal is a function, in part, of the ideological commitment to a narrow model by CL practitioners, which would be frozen in place by Professor Fairman's proposal. Although proponents of CL aspire for its broad growth as a movement, their orthodox commitment to their specific model severely limits its general applicability. If Professor Fairman's proposal would be adopted, the overwhelming majority of lawyers would find it irrelevant to their work and thus it would have limited impact on legal practice. Based on past experience, virtually no lawyers handling nonfamily cases would be affected and even many family lawyers would not be engaged because they would find the model to be too restrictive. Moreover, Professor Fairman's proposal would signal that most lawyers are uncollaborative and that the legal profession generally would have little to gain from CL.

By contrast, Professor Peppet's proposal has the potential for much greater impact on legal practice. In addition to benefiting CL practice, it would promote a range of other processes including settlement counsel, Cooperative Law, and even ad hoc efforts to be collaborative in individual cases.³³⁶ Rather than providing clients with a single, fixed model to accept or

promote one form of ADR over another, it would be Professor Lande's preference for so-called 'cooperative law.'" Fairman, *supra* note 194, at 733 (emphasis added). He explains his reasoning as follows: "Professor Lande sees his support for cooperative law as providing a choice, not a preference. I see accommodation for this variant as tantamount to promotion given that cooperative law is contrary to collaborative law on the defining element of the withdrawal agreement." *Id.* at 733 n.129.

This is Alice-in-Wonderland logic. Fairman essentially argues that by suggesting that parties have good access to processes such as Cooperative Law in addition to his preferred process, CL, that I prefer the other processes. In fact, I have argued that parties may well prefer CL over Cooperative Law in some situations. See Lande & Herman, *supra* note 62, at 285. See also MID-MISSOURI COLLABORATIVE AND COOPERATIVE LAW ASSOCIATION, CHOOSING COLLABORATIVE LAW OR COOPERATIVE LAW (2006), http://www.mmcla.org/choosing_ccl.pdf (identifying benefits and possible risks of both Collaborative Law and Cooperative Law).

³³⁵ See *supra* notes 52–53, 87–88 and accompany text.

³³⁶ See *supra* notes 234–38 and accompanying text.

reject, it gives a greater variety of options of features to choose to a much greater population of clients (as well as the dispute resolution professionals who serve them). Although there certainly are some variations within the CL model,³³⁷ the range of choices is much narrower than under Professor Peppet's proposal.

More generally, Professor Peppet's proposal focuses on systemic change in negotiation by inviting lawyers to be as agreeable as they and their clients deem appropriate in given cases. Because his proposal does not require lawyers and clients to use a disqualification agreement, it would have much greater appeal to lawyers in nonfamily cases. Moreover, rather than marking a sharp divide between CL lawyers and other lawyers, it would indicate that all lawyers may want to use tools to help clients negotiate more cooperatively in some cases. The provisions creating general designations of lawyers would also permit greater specialization, development of reputations for cooperation, and market definition. Thus, this proposal has the potential to stimulate broader changes in the system of legal practice.

Publication of both proposals reflects the ideas of individual scholars, reflecting a traditional and appropriate mechanism for advancing theory and practice. For either proposal to advance, it would be helpful and appropriate to engage representatives of the range of affected stakeholder groups in analyzing their interests and revising the proposals accordingly.³³⁸

³³⁷ See Lande, *supra* note 29, at 1376 n.244.

³³⁸ Fairman asks who would be the stakeholders:

Who exactly are these stakeholders that should be included in collaborative law's ethical rulemaking? Collaborative lawyers for sure, but anyone else? A cooperative law practitioner—if one exists? General practitioners? Former clients? A triumvirate of academics—like Lande, Peppet, and me? If these are our stakeholders, couldn't we already identify this group and go forward? But move forward with what. Who will set the ethical agenda and convene the stakeholders? And to what end. Apparently there are distinct advantages to laying claim to the option to do nothing except wait and see.

Fairman, *supra* note 194, at 737. In keeping with his proposal for a new rule, Fairman's question assumes that the appropriate policy necessarily would be to develop a new rule. My proposal would be to focus on a careful policy analysis, which might or might not ultimately result in the adoption of a new rule, depending on the results of a needs assessment.

For example, CL practitioners who want to encourage parties in nonfamily cases to use CL might convene representatives of typical parties, trade association officials, insurance company representatives, judges, court administrators, professionals in allied professions—such as accountants or bankers, as well as CL and non-CL lawyers who practice in the area. This might include Cooperative lawyers, who do, in fact, exist. See, e.g., DIVORCE COOPERATION INST., COOPERATIVE DIVORCE AGREEMENT, *available at*

3. *Excessive Reliance on Regulation as Policy Strategy*

Professor Fairman's proposal relies exclusively on adoption of a new ethical rule as a policy strategy rather than proposing a more comprehensive strategy that incorporates a range of policy options and that recognizes the limits of rulemaking. His proposal assumes that promulgating an ethical rule would be effective in changing complex behavior to adhere to the rulemakers' intentions,³³⁹ although there is much evidence that people often

<http://cooperativedivorce.org/members/members.cfm> (last visited Jan. 30, 2007) (roster of 72 Cooperative Lawyers in Wisconsin). Although academics are not likely to be stakeholders, it might be helpful to include some academics to contribute their knowledge and perspective in a DSD planning committee. This list is illustrative and not intended to be comprehensive. Some of these potential stakeholders might not be interested in participating and there might be other groups that should be represented. The DSD committee would do some assessment of the needs of the stakeholders for handling legal disputes and perceived deficiencies of the status quo. Depending on the results of the needs assessment, the planning committee might recommend adoption of rules, educational efforts, and/or other policies to address the identified needs.

For a hypothetical example of rulemaking in the family context, if rulemakers were to become aware of significant problems because victims of domestic abuse were not sufficiently protected in the CL process, the rulemaking authority might convene a policy planning committee of stakeholders. An illustrative and nonexhaustive list of potential stakeholder groups in this context might include family court judges and other court personnel, family mediators, mental health professionals, advocates for battering victims, social service providers, and CL and non-CL family lawyers. Again, the convenors might include academics if that would be helpful. The committee would do a needs assessment to investigate the nature and extent of the problem, and if it revealed significant problems, the committee might recommend adoption or revision of legal rules specifically governing CL and/or other policies to address the problems.

Obviously, this is not "doing nothing" as Fairman claims.

³³⁹ For example, Fairman cites problems experienced by lower-functioning clients and inexperienced CL lawyers regarding informed consent, and he assumes that merely promulgating a new ethical rule would make a significant contribution to solving their problems. *See* Fairman, *supra* note 194, at 721–22. This is a questionable assumption at best, especially considering that the doctrine of informed consent is already well-established in the general ethical rules.

Like many lawyers and legal scholars operating based on legal centralist assumptions, Fairman generally assumes that rules are the right way to manage behavior and that they necessarily have pragmatic effects. *See supra* note 94 and accompanying text (describing legal centralist premises). He writes, "Professor Lande speaks of 'principles' and 'policymaking.' I prefer the practicalities." Fairman, *supra* note 194, at 737. Our difference, however, is not about preferences for practical results. The policymaking principles that I propose are intended to produce very practical effects. Our difference is about which approach to policymaking is likely to be more effective in

ignore or “game” rules.³⁴⁰ To his credit, Professor Fairman identifies various mechanisms within the CL community as a form of ethical regulation. But his proposal does not consider those mechanisms as part of a comprehensive strategy, in part because he believes in the value of having a uniform rule for CL practice. As a result, his proposal would not be as effective as a comprehensive strategy that focuses primarily on enhancing localized capabilities for promoting good CL practice.

Noting that ethical rules are not widely enforced, Professor Fairman bases his proposal on the premise that “[r]ules of ethics serve a vital educational function”³⁴¹ which is “sufficient in itself to justify creation of a new rule.”³⁴² Rules are typically adopted to regulate behavior by defining permissible behavior and using (or threatening) legal sanctions for rule violations. Education is not the primary purpose of such rules, but rather is a mechanism to promote compliance.³⁴³ Ethical rules clearly can help spur educational efforts, both as a source of motivation (i.e., to comply with requirements and avoid adverse consequences) and as a body of material to be learned. Certainly practitioners need continuing education, especially in new areas of practice like CL. Adopting a special rule specifically for CL presumably would have some educational benefit in focusing lawyers’ attention on ethical issues, though it is not clear how much additional benefit it would provide or whether the benefit would outweigh the disadvantages of doing so. There are many other policy options to promote education, and policymakers are wise to develop strategies employing the most appropriate combination of policy options. This is especially true in the CL context,

achieving our respective goals, and I submit that my approach is more likely to produce significant practical benefits.

³⁴⁰ See *supra* note 108 and accompanying text.

³⁴¹ Fairman, *supra* note 25, at 75. He writes, “[p]urely from an educational perspective, new rules for collaborative law seem warranted.” *Id.* at 76.

³⁴² Fairman, *supra* note 194, at 709.

³⁴³ The Preamble to the Model Rules of Professional Conduct states that achieving compliance “depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.” MODEL RULES OF PROF’L CONDUCT pmb. ¶ 16 (2004). Courts and bar associations are prudent to rely a great deal on educational strategies to accomplish the goals of ethical rules. Educating lawyers to comply voluntarily is likely to be an effective and efficient approach for most lawyers. Relying primarily on enforcement would require many more resources than are likely to be available and would probably be ineffective in preventing or addressing many violations. Nonetheless, the potential for enforcement is an essential element of ethical rules and distinguishes them from nonregulatory educational efforts.

which is developing an incredible array of educational resources.³⁴⁴

Professor Fairman provides an excellent overview of the multiple forms of ethical guidance available for CL lawyers. He notes that CL lawyers are organized into local practice groups which provide a gatekeeping function, both for initial admission as well as for continued membership.³⁴⁵ These groups typically have membership requirements including education, basic and continuing training, attendance at group meetings, and commitment to use a standard CL participation agreement³⁴⁶ and comply with specialized ethical standards promulgated by CL organizations.³⁴⁷ Nonetheless, Professor Fairman does not seriously consider whether direct educational efforts using the robust CL infrastructure³⁴⁸ would produce a more effective educational strategy. For example, other options include formation of ethics committees by CL organizations, publication of new protocols and educational materials for CL professionals and clients about ethical issues,³⁴⁹ development of ethics modules for CL trainings, use of listservs or websites to identify ethical problems and suggest ways to address them, use of peer consultation group techniques in regular CL membership meetings, and establishment of regular ethics tracks in CL conferences. Given the complex nature of ethical problems that Professor Macfarlane describes,³⁵⁰ these kinds of more intense and interactive strategies seem much more likely to be effective in addressing actual ethical problems than merely promulgating a

³⁴⁴ See *supra* notes 34–41 and accompanying text.

³⁴⁵ Fairman, *supra* note 25, at 96–98.

³⁴⁶ See, e.g., Collaborative Family Law Association, Application for Membership, <http://www.collaborativefamilylaw-mo.org> (last visited Jan. 30, 2007).

³⁴⁷ Various Collaborative Practice organizations have established ethical codes and detailed protocols, most notably the International Association of Collaborative Professionals, which has promulgated “Principles of Collaborative Practice,” “Minimum Standards for Collaborative Practitioners,” “Minimum Standards for a Collaborative Basic Training,” “Ethical Standards for Collaborative Practitioners,” and “Minimum Standards for Collaborative Trainers.” International Academy of Collaborative Professionals, Standards, Ethics and Principles, <http://www.collaborativepractice.com/t2.asp?T=Ethics> (last visited Jan. 30, 2007).

³⁴⁸ Fairman writes that he has “no design on systems design.” See Fairman, *supra* note 194, at 714. For description of the current CL infrastructure, see *supra* notes 34–43 and accompanying text.

³⁴⁹ A protocol that may be particularly instructive about ethical problems would be for professionals to regularly collect feedback from clients. Thanks to Julie Macfarlane for this suggestion.

³⁵⁰ See *supra* notes 251–56, 266–70, 290 and accompanying text.

necessarily vague ethical rule.³⁵¹ Of course, these are not mutually exclusive policy options, and one could develop a strategy that includes both direct educational initiatives as well as new regulation. Logically and strategically, however, it would make sense to focus first on the educational initiatives and propose a new rule only if such direct educational initiatives seem inadequate.

The CL infrastructure is an especially important collection of tools for the developing CL practice, so policymakers should make particular efforts to strengthen it. The local practice groups and the broader Collaborative professional associations are grappling with actual problems and developing experience-based insights and protocols. The kinds of educational initiatives suggested here would help develop that infrastructure. By contrast, drafting a new ethical rule would involve a relatively small number of experts in a centralized process that would engage a much smaller proportion of the CL community.³⁵² In the first instance, CL practitioners should have the opportunity to develop and refine their philosophies and techniques.³⁵³

Professor Fairman notes that CL participation agreements provide some ethical guidance, but he contends that they are inadequate because they do not provide a consensus on ethical practice and they do not bind CL lawyers to an ethical code. "Consequently, the nuanced ethical issues implicated by collaborative law cannot be adequately addressed. Important questions are answered with generalities or omitted altogether Thus, the participation agreement is not a substitute for an ethical code for collaborative lawyers."³⁵⁴ He certainly is correct that participation agreements cannot substitute for an ethical code for CL lawyers. Since the states already have ethical rules governing lawyers' behavior, no substitute is needed.³⁵⁵ Rather, participation

³⁵¹ See *supra* Part II.C.5.

³⁵² Cf. Lande, *supra* note 49, at 109–18 (arguing that a dispute system design process that promotes local participation in policymaking would be more effective in reducing bad faith conduct in mediation than a process relying on rules drafted by a small group of experts).

³⁵³ Fairman asks, "how will these revisions [to CL participation agreements and ethical codes] ever take place absent an authoritative model?" and answers this question by saying that, "[i]n order to facilitate the revision process, Model Rule 2.2 is needed first." Fairman, *supra* note 194, at 726. CL practitioners have developed and refined their agreements and ethical codes in the existing regulatory environment. This Article demonstrates that a new ABA rule is not needed and would not actually help them grapple with most, if any, ethical issues.

³⁵⁴ Fairman, *supra* note 25, at 97–98.

³⁵⁵ Arguing that the general ethical rules for lawyers are incompatible with CL, Fairman criticizes a provision in the Ethical Standards for Collaborative Practitioners

agreements (and CL organizations' ethics standards) are useful to *supplement* the general ethical rules.³⁵⁶ Indeed, the courts and bar association ethics committees have limited expertise and interest in CL and thus would have difficulty making nuanced interpretations of specific CL practices that are not governed by the general ethical rules. To the extent that CL participation agreements and ethical codes do not properly address nuanced ethical issues, the solution should be to revise the agreements or specialized codes rather than for the ABA to adopt a new general ethical rule about CL.³⁵⁷ CL practice is still quite new, and it will take time to develop, including dealing with novel ethical issues, so it should not be surprising (or disturbing) that there is not uniformity in CL practice. Indeed, there is great value in having a diversity of practices to promote innovation and choice, especially in this early phase of development.³⁵⁸

The existing policy process is well designed to identify and address ethical problems, and it should be permitted to work unless and until there is evidence that it is inadequate and that a new ethical rule is likely to achieve

issued by the International Association of Collaborative Professionals requiring practitioners to comply with the ethical rules of their disciplines. *See id.* at 101. I disagree that there is such incompatibility, as described *supra* Part III.C.1.b.

³⁵⁶ Fairman's proposed rule is not justified as a default rule. *See supra* notes 146–50 and accompanying text (describing one justification for regulation as providing default rules when a substantial number of people have actually encountered significant problems because their ADR agreements were silent or ambiguous about particular issues). The provisions in Fairman's proposed rule are generally covered in a combination of the general ethical rules for lawyers, CL organizations' ethical codes, and CL participation agreements. Practitioners can get much more detailed ethical education by referring to the International Association of Collaborative Professional's ethics standards, for example, than by consulting Fairman's proposed rule. *See Int'l Acad. Collaborative Prof., Ethical Standards for Collaborative Practitioners, available at* <http://www.collaborativepractice.com/articles/EthicsStandardsfinal.pdf> (last visited Jan. 30, 2007).

³⁵⁷ Fairman notes that participation agreements frequently include good-faith requirements, which I have criticized in mediation and CL rules. *See* Fairman, *supra* note 194, at 733. Although I believe that there are significant potential problems with good-faith requirements, the problems are magnified if these requirements are etched into legal rules, which have broad applicability and are hard to change. By contrast, if individual practitioners (or practice groups) include such provisions in their participation agreements, the effects are limited to those practitioners and their clients. It is easier for local groups and practitioners than official rulemakers to change provisions if problems arise. Moreover, based on values of diversity and choice, I endorse practitioners developing their own approaches based on their own perspectives, even though I may have a different perspective.

³⁵⁸ *See supra* Part II.B.

appropriate policy goals. The current process starts with the foundation of the general ethical rules governing lawyers, particularly the ABA's Model Rules of Professional Conduct.³⁵⁹ Bar association ethics committees (at the national, state, and local levels) write opinions to provide a common law gloss on the rules. Much like courts interpreting statutes, ethics committees confront concrete problems and develop incremental rules based on experience. Judges sometimes exercise restraint by deferring decisions until after there has been sufficient opportunity for the issues to "percolate."³⁶⁰ Thus higher courts sometimes decide not to take cases or decide issues until enough lower courts have had a chance to consider the issues. Similarly, in the federal system, the states are considered "laboratories of democracy" that permit states to choose their own rules and permit federal policymakers to

³⁵⁹ Ethical rules based on the Model Rules have been adopted by all but three states. See A.B.A., Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Jan. 30, 2007).

³⁶⁰ See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 435–41 (2004) (describing differing views of Supreme Court justices about percolation of issues in federal courts); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 929 (1983) ("When circuits differ, they provide reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts act as the 'laboratories' of new or refined legal principles (much as the state courts may do in our federal system).").

Todd Tiberi provides a useful summary of arguments in favor and against courts' use of percolation. Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 863–69 (1993). Advocates of percolation argue that it results in better decisions because judges will have more arguments to consider and that weaker arguments would have been "weeded out" in earlier cases. *Id.* at 864–66. Opponents of percolation argue that delay in resolution of legal issues results in inconsistent decisions, unnecessary litigation, and diminished respect for federal law. *Id.* at 866–69. Tiberi attempts to test empirically whether percolation produces better results. He analyzes statutory interpretation cases in the 1988 term of the U.S. Supreme Court and compares "percolated cases"—defined as cases with conflicts between circuits—and nonpercolated cases. To measure quality of decisions, he canvasses reactions of legal commentators, Supreme Court justices' votes in cases, and whether Congress later "overrode" the decisions. He concludes that "percolated decisions are not demonstrably better than nonpercolated ones." *Id.* at 869–82. One should not put much weight on these findings considering the crude methodology and the fact that percolated decisions (i.e., where the circuits are split) are likely to be more controversial than nonpercolated decisions, and so one should not expect that those decisions would be viewed more favorably. Moreover, the situation that Tiberi studied is different from the current situation in CL, where the ethics opinions have minor variations but no clear conflicts. See *supra* Part III.C.1.c.

consider different states' experiences as experiments to inform decisions on the federal level.³⁶¹ In relatively unusual situations, it makes sense to adopt new rules to deal with new issues or revise old rules to correct problems in interpretation. In the CL context, the "common law" process of producing ethics opinions seems sufficient to provide guidance to practitioners, ethics committees, and courts.³⁶² Professor Fairman has not demonstrated the inadequacy of the combination of general and specialized ethical policies to manage CL practice.³⁶³

It would be quite premature for the ABA to promulgate a Model Rule for Professional Conduct for CL as Professor Fairman suggests.³⁶⁴ Both the CL

³⁶¹ Supreme Court Justice Louis Brandeis is credited with the concept of using states as laboratories of democracy, writing, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Fairman argues that adopting a Model Rule for CL would still permit experimentation by states. *See* Fairman, *supra* note 25, at 77. That is technically true as states are free to modify model rules proposed by the ABA. As a practical matter, it seems unlikely that there would be interested and knowledgeable stakeholders in most states who would be motivated to engage in the rulemaking process. For most courts and legislators, this would be a relatively obscure topic that would not merit much of their attention. For state policymakers, the virtue of having model rules is that the policymakers would not need to do much analysis of their own as they can rely on national experts who have done much more sophisticated analysis than they would be able to do.

³⁶² Fairman cites my criticism of a point in an ethics opinion to suggest that this undermines my argument in favor of a common law process in which issues are refined through percolation. *See* Fairman, *supra* note 194, at 722 (referring to my criticism of an ethics opinion that would prevent CL lawyers from undertaking a CL case if there is a "significant" risk of impasse). On another point, he characterizes my view as "resolv[ing] the conflict by fiat." *Id.* at 722 (referring to my argument that CL lawyers are and should be considered as advocates rather than neutrals under the ethical rules). However, it is just such criticism by legal and scholarly authorities that leads to incremental improvements with experience and reflection. I do not propose enacting a rule to reflect my views on the subject. Instead, in future opinions, ethical authorities can consider my argument and adopt my recommendation if they find it persuasive. Fiat is not when commentators publish criticisms of legal rules or opinions. Real "fiat" is when policymakers do not undertake a careful policymaking process before adopting binding rules that provide for real sanctions.

³⁶³ *See supra* Parts III.C.1.b, III.C.1.c.

³⁶⁴ Fairman suggests that the ABA should start drafting CL rules now because it is a lengthy process:

community and the ABA need much more experience with ethical issues arising from CL practice before drafting such a rule. The CL community needs more time to develop its infrastructure dealing with ethical issues. The ABA has relatively little experience with CL and would be in an odd position to direct a rule-drafting process on a subject that ABA leaders know relatively little about.³⁶⁵ In drafting a Model Rule, the ABA would need to rely on CL leaders for their experience. Given the CL community's own institutional interests,³⁶⁶ the ABA would need to be sufficiently sophisticated

Amazingly, it was not until 2002 that recognition of the most basic form of ADR—use of a third-party neutral—found its way into the Model Rules. There is a lesson to be learned from the long journey for third-party neutral inclusion into the Model Rules as Rule 2.4: Even the most basic recognition of the reconceptualization of lawyer roles takes a long time.

Fairman, *supra* note 194, at 736. In the twenty-six years between the 1976 Pound Conference and the adoption of Rule 2.4, the dispute resolution field somehow survived and grew. Fairman provides no evidence that Rule 2.4 has changed practice at all. Indeed, focusing on Fairman's goal of education, five years after the adoption of Rule 2.4, it seems likely that few lawyers or neutrals are even aware that it exists, let alone the content of its provisions. A better lesson from the example of Rule 2.4 is that adoption of a rule is and should be a "lagging indicator" that often follows, rather than precedes, intensive development of professional norms.

³⁶⁵ If the ABA would consider adopting a Model Rule for CL, it might use Fairman's proposal as a starting point, but it would presumably consult widely and consider alternative provisions. Certainly there is some knowledge about CL within the ABA, including by individual leaders of the Family Law and Dispute Resolution Sections and as reflected by the Family Law Section's publication of a CL manual. *See* TESLER, *supra* note 31. This has not penetrated deeply within the ABA, including its Center for Professional Responsibility, however. For example, the ABA has not issued any ethical opinions about CL.

³⁶⁶ Virtually all movements and organizations have self-interests, so it would be unusual if the CL community did not have its own self-interests. A disturbing example in the CL community is reflected in a common response to a suggestion that, in addition to offering CL, collaborative practitioners offer clients the option of using "Cooperative Law." Many CL practitioners reject this suggestion fearing that clients would "take the easy way out" by choosing Cooperative rather than Collaborative Law. *See* Hoffman, *supra* note 74, at 4 (noting "fear [by CL practitioners] that clients will opt for the easier, less onerous forms, rather than embrace the real deal and that, by taking an easier path, will fail to get all of the attendant benefits of [CL]"). Of course CL lawyers have no duty to offer clients Cooperative Law and may decline to do so believing that CL is preferable to Cooperative Law. Nonetheless, the decision not to offer Cooperative Law out of fear that the clients would make the "wrong" choice reflects an ethical insensitivity to the serious pressure that some clients feel to use CL or stay in the process. *See* MACFARLANE, *supra* note 59, at 65, 69 (research finding that "[m]any [Collaborative] lawyers promote the collaborative process to all their potential family clients" and that one of the clients

to identify and check those interests so that a new Model Rule would protect clients' interests appropriately. Both the CL community and the ABA are years away from that level of sophistication in my view.³⁶⁷ Promulgating a Model Rule for CL risks prematurely fixing a national standard based on an

studied "clearly experienced a form of entrapment"); N.J. Ethics Op. 699, *supra* note 299, at 5 (describing risk "that the parties could become 'captives' to a process that does not suit their needs"). Moreover, it places a higher priority on an interest in the CL movement to increase the market for CL services over clients' interests in making their own informed choices about what process best serves their interests. Many CL practitioners claim that it would be too confusing to clients to offer both options, but that is not necessarily true (and a disingenuous claim by practitioners with a stated commitment to promoting client decision-making). See Mid-Missouri Collaborative and Cooperative Law Association, Choosing Collaborative Law or Cooperative Law, http://www.mmcccla.org/choosing_ccl.pdf (last visited Jan. 30, 2007) (one-page handout describing similarities and differences between Collaborative and Cooperative Law). Given the perceived self-interests within the CL community, policymakers need to carefully scrutinize claims made by CL practitioners.

³⁶⁷ As Fairman notes, researchers have conducted two studies of CL. Fairman, *supra* note 25, at 81–83. Although this is a good start in developing independent assessments of CL practice, two studies represents a tiny knowledge base. By comparison to research on mediation, it is a "drop in the bucket." See, e.g., Symposium, *Conflict Resolution in the Field: Assessing the Past, Charting the Future*, 22 CONFLICT RESOL. Q. 1 (2004).

Responding to my argument about insufficient current sophistication in the ABA to draft a new ethical rule about CL, Fairman cites the recommendation by the NCCUSL Committee on Scope and Program for appointment of a drafting committee on CL. See Fairman, *supra* note 194, at 728–29. This is an unpersuasive argument for many reasons. First, the ABA promulgates the Model Rules of Professional Conduct, not NCCUSL. Moreover, so far, the NCCUSL effort does not inspire great confidence in its own expertise. NCCUSL's decision to appoint a drafting committee was based on a one-page "study" completed by a four-person study committee that conducted two conference calls. See Study Committee for Collaborative Law, National Conference of Commissioners on Uniform State Laws, Recommendation for Appointment of Drafting Committee Regarding a Uniform Collaborative Law Act (May 2006) (on file with author). The Study Committee recommendation includes no factual findings beyond the facts that CL is practiced in most jurisdictions, there are some statutes and courts rules, and the International Academy of Collaborative Professionals supports development of a uniform act. *Id.* The Recommendation concludes, without any support, that appointment of a drafting committee is consistent with NCCUSL policy and that a uniform CL act would "produce significant benefits to the public." *Id.* The recommendation does not include, however, any specification of the issues to be addressed in the drafting process. *Id.* Although it would be inappropriate for NCCUSL to draft an ethical rule for lawyers, it may be appropriate for it to draft a uniform statute governing matters such as restriction of use of CL communications in court under the principles proposed in this Article. See *supra* Part II.C.4. Hopefully NCCUSL will exercise sophisticated independent judgment in drafting such a statute.

inadequate base of experience. The ABA should intervene only if it finds that CL practice is generally (1) causing serious problems to legal clients, (2) resistant to cure by the CL community itself, and (3) inconsistent with or inadequately regulated by the current Model Rules of Professional Conduct. Considering that there apparently have been no formal complaints³⁶⁸ and that the existing rules seem quite adequate,³⁶⁹ there is little risk in deferring development of a new Model Rule until there is a clear demonstration of need and the ABA's institutional capability to develop sound policy in this area.

Professor Peppet's proposal also focuses exclusively on enacting new ethical rules, which he argues are needed to achieve his policy goals because of the potential for legal sanctions to change lawyers' behavior.³⁷⁰ Specifically, he contends that rules will help lawyers credibly commit to provide the information needed for interest-based negotiation by risking serious consequences if they renege on their commitments.³⁷¹ This is a more appropriate use of legal rules than in Professor Fairman's proposal for two reasons. First, it relies on legal sanctions, which only legal rules can provide. Second, the rules are designed to protect consumers against misrepresentation about a key claim in negotiation, namely that the lawyers would not use puffing and related tactics.

Although the use of rules in Professor Peppet's proposal is justified under the principles set out in this Article, it is not clear how effective the proposal would be to change lawyers' behaviors. Professor Peppet identifies significant reasons why it might not be effective. If lawyers would make the claims authorized in his proposed rules and then renege, it would often be hard to determine that they have done so and actually enforce the rules properly.³⁷² This is particularly difficult because it is so hard to make subtle determinations about whether, in the context of complex negotiations, a lawyer has been truthful, disclosed all material information, negotiated in good faith, or avoided causing substantial injustice. There are not "bright line" standards for these duties.³⁷³ Moreover, Professor Peppet "fuzzes" the

³⁶⁸ See *supra* text accompanying note 250.

³⁶⁹ See *supra* Parts III.C.1.b, III.C.1.c.

³⁷⁰ Peppet, *supra* note 28, at 497–98.

³⁷¹ *Id.* at 521–25.

³⁷² *Id.* at 528–29, 534–35. He writes, "[t]he experiment may fail because of verification and enforcement problems, but it may not. It is worth a try." *Id.* at 535.

³⁷³ For example, his proposal provides sanctions for lawyers who fail to comply with obligations undertaken to "negotiate in good faith." *Id.* at 523–24. For discussion of problems with a good-faith requirement, see *supra* notes 109–16 and accompanying text.

line to reduce the risk that the rules would set unrealistic standards:

Although collaborative strategies often involve sharing more information than more adversarial strategies, collaboration does not mean revealing *all* of one's information, preferences, interests, and litigation strategies. Two collaborating lawyers may agree to work through a decision analysis of their claims and counter-claims or arrange for a trusted third party to assist them with valuing their litigation, but they need not reveal their proverbial cards completely. Similarly, they can talk about their clients' interests without fully disclosing the strength or relative importance of those interests.³⁷⁴

Even if lawyers could readily determine whether specific negotiation behaviors violated the rules, a significant proportion of lawyers would probably be reluctant to file disciplinary complaints to enforce the rules as it would violate a norm of professional comity.³⁷⁵ On the other hand, it is foreseeable that some lawyers would abuse the rules for partisan advantage by filing disciplinary complaints to intimidate opposing lawyers.³⁷⁶ Thus,

Fairman writes, "Even Professor Peppet's proposal—which Professor Lande prefers over mine—includes a undefined good faith provision." Fairman, *supra* note 194, at 734. Although I believe that Peppet's proposal is preferable to Fairman's in some respects, I argue that use of "good faith" provisions is problematic in both proposals. *See supra* note 109.

³⁷⁴ Peppet, *supra* note 28, at 535.

³⁷⁵ Peppet recognizes this possibility and argues that "[i]f the profession can gather the will to enact a contract-based code, it may have the will to step up enforcement measures." *Id.* at 534. This is not necessarily true. It is much easier for rulemakers to adopt such a general rule than for rank-and-file lawyers to incur the economic and non-economic costs of filing complaints against members of their legal community in actual cases.

³⁷⁶ Peppet recognizes this risk and argues that "[i]f a lawyer and her client know that they have nothing to hide, and they know that they are willing to act honestly in their negotiations, then the risk of unjustified professional disciplinary sanctions is low." *Id.* at 536. He argues that lawyers would undertake this risk in particular cases only if they knew enough about their adversaries and clients to determine that the level of risk is relatively low. *See id.* Even if lawyers would believe that they are acting honestly, complying with the rules, and would be vindicated in a disciplinary process, they may nonetheless be reluctant to expose themselves to the risk that an adversary would bring a baseless complaint. Peppet is probably right that most lawyers would generally do so only in cases where they already had confidence in the lawyers and parties in the litigation. This dynamic is somewhat inconsistent with the rationale of his proposal, namely to provide structural incentives for interest-based negotiation where such prior knowledge is lacking. *See id.* at 481–84, 497–98. This is not a fatal problem for Peppet's proposal, but it significantly limits the potential impact.

although Professor Peppet's proposal might actually promote more interest-based negotiation, its reliance on the powerful tool of legal sanctions creates serious risks of underuse or overuse.

Even if a rule change would be needed to achieve Professor Peppet's policy goals, it is unlikely to be sufficient considering the traditions of lawyering deeply embedded in the legal culture that he proposes to change. His proposal does not consider nonregulatory policy options that might be appropriate instead of or in addition to his proposed rule changes. That is not surprising as scholars generally cannot provide comprehensive proposals in a single article. Developing a more comprehensive strategy would make the proposal more effective. His proposal relies on lawyers to decide whether to take advantage of it or not. He writes, "[p]erhaps after a few years it would be clear that almost all lawyers found these provisions helpful, and they could be transformed into aspirational default provisions. Perhaps the opposite would become clear, and few lawyers or clients would make use of them."³⁷⁷ Thus, his plan essentially relies on the market with little apparent promotion or support. It would be much more effective if it were incorporated in a broader strategy to educate and motivate lawyers to secure adoption of the rules and, following adoption, to take advantage of them and address problems that would arise. Ideally, the strategy would be developed and implemented through active consultation with interested stakeholders. The CL movement and its infrastructure provide useful models to consider in developing nonregulatory policies that might be included and adapted in such a strategy.

4. *Potential for Synergy with the Legal System*

Both Professor Fairman's and Professor Peppet's proposals provide for some synergy with the legal system. Both treat the legal system with considerable respect and would permit lawyers and parties to continue operating under the status quo while adding a valuable option for those interested. Both proposals avoid the extremes of the assimilative and autonomous approaches.³⁷⁸ Both contemplate the maintenance of distinctive models of lawyering using interest-based negotiation, recognizing that a substantial part of the legal profession—perhaps the overwhelming majority—would continue using traditional, positional negotiation. And both recognize the value of maintaining respectful relationships with leaders and practitioners in the contemporary legal system. Professor Peppet's analysis

³⁷⁷ *Id.* at 529.

³⁷⁸ See *supra* notes 186–93 and accompanying text.

provides a particularly realistic and sympathetic understanding of lawyers operating in a traditional mode. Although it is tempting for some ADR proponents to suggest that lawyers and the legal system should follow principles and procedures at the highest aspirational level, Professor Peppet's analysis appreciates the practical difficulties that would be involved. Thus he appropriately proposes that the default rule should be the status quo, where lawyers are permitted to engage in puffing, rather than expecting most lawyers to make a sudden major shift in lawyering culture.³⁷⁹

The dispute resolution professionals who promote and implement ADR innovations are responsible for maintaining the fundamental values of their processes, honoring the values of the contemporary system, and being flexible enough to satisfy needs of practitioners and the public. Both Professors Fairman and Peppet set a good tone to follow.

IV. CONCLUSION

In the three decades since the Pound Conference in 1976,³⁸⁰ ADR has become institutionalized in the courts, legal profession, and society. It is still vital, spawning new innovations such as Collaborative Law, Cooperative Law, and settlement counsel. The challenge for the future is to continue developing in ways that increasingly meet the needs of the public and society generally. In my view, this requires commitment to key principles such as the use of sound dispute system design techniques in policymaking, promotion of informed decisionmaking by the principals in disputes, openness to continued innovation, development of comprehensive strategies with sound use of regulatory and other policy options, and maintenance of appropriate relationships with the legal system and other social institutions. If the ADR field follows these principles, it will be more effective in improving the ways that people handle their disputes.

³⁷⁹ See Peppet, *supra* note 28, at 516–18, 525–27.

³⁸⁰ Professor Jeffrey Stempel suggests that the 1976 Pound Conference marks the beginning of the modern ADR movement. Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–310 (1996).